UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE LORAZEPAM & CLORAZEPATE ANTITRUST LITIGATION

MDL Docket No. 1290 (TFH)
Misc. No. 99ms276 (TFH)

This Opinion applies to:

FEDERAL TRADE COMMISSION,
Plaintiff,

v.

MYLAN LABORATORIES, INC. et al.,
Defendants.

and

STATE OF CONNECTICUT, et al.,
Plaintiffs,

v.

MYLAN LABORATORIES, INC. et al.,
Defendants.

and

UNITED WISCONSIN SERVICES, INC., et al.,
Plaintiffs,

v.

MYLAN LABORATORIES, INC. et al.,
Defendants.

and

ARKANSAS CARPENTERS HEALTH AND WELFARE FUND,
Plaintiff,

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v.

MYLAN LABORATORIES, INC. et al.,
Defendants.

MEMORANDUM OPINION Re: Settlement

Pending before the Court are several motions for final approval of various settlement agreements reached in this MDL action. The Federal Trade Commission and all fifty states and the District of Columbia seek final approval of their settlement agreements with the defendants, which this Court preliminarily approved on April 27, 2001, and the third party payors seek final approval of settlement agreements preliminarily approved on February 9, 2001. Upon careful consideration of the motions and the affidavits, declarations, and reports filed in support thereof, the objections to the settlements filed by various class members, the representations made by all parties at the fairness hearing held on November 29, 2001, and the entire record herein, the Court will grant each motion.

I. BACKGROUND[1]

A. Plaintiff States

On December 22, 1998, ten states ("Litigating States") and the Federal Trade Commission ("FTC") filed lawsuits with this Court, charging the defendants with entering illegal agreements to monopolize the markets for the generic anti-anxiety drugs, lorazepam and

[1] The underlying alleged antitrust violations in this case has been thoroughly discussed in previous decisions of this Court, e.g., FTC v. Mylan Labs., Inc., 62 F. Supp. 2d 25, 32-35 (D.D.C. 1999); In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 14-17 (D.D.C. 2001), and thus will not be reiterated in full measure here.

clorazepate, in violation of various federal and state antitrust laws.[2] On February 8, 1999, the Litigating States amended their complaint, adding twenty-one states and the District of Columbia as plaintiffs.[3] On May 13, 1999, Maryland joined the other thirty-two Litigating States.[4]

After extensive discovery was conducted, the parties began to explore the possibility of settlement in late Spring 2000. The FTC, thirty-three Litigating States, Mylan, Cambrex, Profarmaco, and Gyma reached an agreement in principle in August 2000, under which the defendants would pay $100 million toward consumer and state agency compensation and an additional $8 million toward costs and fees for the investigation and litigation in this matter. In return, the thirty-three Litigating States agreed to exert their best efforts to bring into the settlement eighteen states ("Joining States") that were not yet a part of this litigation. They were successful in this endeavor, and on February 1, 2001, all fifty states and the District of Columbia ("Plaintiff States") jointly filed a third amended complaint.[5] At the same time, the Plaintiff

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[2] The original ten Plaintiff States in Connecticut v. Mylan Labs., Inc., No. 98-3115, were Connecticut, Florida, Illinois, Minnesota, New York, North Carolina, Ohio, Pennsylvania, West Virginia, and Wisconsin. They named as defendants Mylan Laboratories, Inc. ("Mylan"), Cambrex Corporation ("Cambrex"), Profarmaco S.R.L. ("Profarmaco"), Gyma Laboratories of America, Inc. ("Gyma"), and SST Corporation ("SST"). The FTC's action, FTC v. Mylan Labs., No. 98-3114, named Mylan, Cambrex, Profarmaco, and Gyma, but excluded SST.

[3] The states, in addition to the District of Columbia, added in the amended complaint were Alaska, Arkansas, California, Colorado, Idaho, Iowa, Kentucky, Louisiana, Maine, Michigan, Missouri, New Mexico, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington.

[4] Maryland v. Mylan Labs., Inc., No. 99-1158.

[5] In addition, the FTC and the defendants worked out the terms of a "Stipulated Permanent Injunction" and jointly moved for its approval on November 29, 2000. The Court reviewed the injunction with the parties on the record at a hearing held on December 4, 2000, and it approved it at a hearing held on February 9, 2001. Under the February 9, 2001 Order and Stipulated Permanent Injunction, the defendants were required to pay the $100 million, $71,782,017.00 of which will be used to pay the claims of consumers residing within the Plaintiff States, and $28,217,983.00 of which will be used to pay state agency claims. The injunction also

States filed two settlement agreements for the Court's review: the "Mylan Settlement Agreement" between the FTC, Plaintiff States, Mylan, Cambrex, Profarmaco, and Gyma; and the "SST Settlement Agreement" between the Plaintiff States and SST. After a hearing on April 27, 2001, the Court preliminarily approved both settlement agreements, the distribution plans, and the notice plan and consumer claims procedure, and it conditionally certified a class of plaintiffs for purposes of settlement only. The FTC and Plaintiff States now seek final approval of the settlements.

B. Third Party Payors

There are also two third party payor actions before the Court. On May 3, 1999, United Wisconsin Services filed the first action here against Mylan, Cambrex, and Gyma, United Wisconsin Services, Inc. v. Mylan Labs., Inc., No. 99-1082.[6] The plaintiffs in United Wisconsin are third party payors who paid for prescriptions of generic lorazepam and clorazepate filled between January 1, 1998 and December 31, 1999 on behalf of health benefit plan members who reside in twenty states-- Arizona, California, the District of Columbia, Florida, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, West Virginia, and

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prohibits all of the defendants from entering exclusive action pharmaceutical ingredient ("API") agreements with nonparties, and Mylan will be prohibited from entering agreements with their codefendants that would prohibit them from selling lorazepam or clorazepate. Each defendant also will have to report to the Commission its compliance with this order within ninety days of the date of the Order and annually for the next five years.

[6] On February 15, 2000, Blue Cross and Blue Shield of Kansas, Inc. and Group Hospitalization and Medical Services, Inc. d/b/a Carefirst Blue Cross BlueShield, Inc. joined the lawsuit as plaintiffs in an amended complaint.

Wisconsin—that have specific indirect purchaser statutes or case law permitting private parties to sue in such a capacity. On January 25, 2001, third party payors in thirty-one other states—Alaska, Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Maryland, Missouri, Mississippi, Montana, Nebraska, New Hampshire, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia, Vermont, Washington, and Wyoming—filed the other action before the Court, Arkansas Carpenters Health and Welfare Fund v. Mylan Labs., Inc., No. 01-0159, to effectuate the settlement of the their claims that had been pending in related state court actions.[7]

Pursuant to orders of the Court, the plaintiffs engaged in extensive coordinated pretrial discovery of the defendants, SST, and other nonparty witnesses. This discovery included the review and analysis of thousands of documents and the taking of more than seventy depositions. The plaintiffs also met with counsel for the FTC and Plaintiff States to engage in further cooperative discovery and investigation. And with their consulting expert, the plaintiffs reviewed and analyzed extensive sales data concerning the generic drugs at issue in this case during the relevant period.

In March 2000, the parties began settlement negotiations. They reached an agreement on settlement amounts by July 2000 and completed negotiations on other terms and conditions of settlement in January 2001. The third party payor plaintiffs, the defendants, and SST executed a Stipulation of Settlement ("Settlement Agreement") in each case on January 29, 2001. After a

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[7] Third party payor plaintiffs had originally filed an action on December 23, 1998 in state court in Tennessee, Middle Tennessee Teamsters Trust Fund v. Mylan Laboratories, Inc., No. 98-3833 (II). Another action was filed in February 1999 in state court in New Jersey, Cement Masons Local Union No. 699 Health and Welfare Fund v. Mylan Laboratories, Inc., No. MER-L-000431-99.

hearing held on February 9, 2001, the Court preliminarily approved both Settlement Agreements and conditionally certified the respective third party payor classes for settlement purposes only.

II. DISCUSSION

A. Plaintiff States

The FTC and Plaintiff States moved for final approval of their settlement agreements on November 5, 2001, specifically seeking: (1) final approval of the Mylan Settlement Agreement and the SST Settlement Agreement;[8] (2) final approval of the Plaintiff States' proposed distribution plans; (3) final approval of the payment of the costs of notice and claims administration; (4) final approval of the payment of attorneys' fees and litigation costs; and (5) both a final ruling that certain states have authority to represent consumers and to settle and release their claims, and a final certification of the following class for settlement purposes only:

> All natural person consumers within Plaintiff States where such a class action may be brought, not otherwise represented by the Plaintiff States as *parens patriae*, who purchased generic lorazepam and/or clorazepate sold in the United States from January 1, 1998 through December 31, 1999.

11/5/01 Mot. at 2.

(1) Final Approval of Settlement Agreements

Approval of a proposed class action settlement lies within the discretion of this Court. In re: Vitamins Antitrust Litig., 2001-2 Trade Cas. (CCH) ¶73,361, 2001 WL 856290, at *1 (D.D.C. July 19, 2001); United States v. District of Columbia, 933 F. Supp. 42, 67 (D.D.C. 1996). Federal Rule of Civil Procedure 23(e) provides that "[a] class action shall not be dismissed or

[8] SST also filed a brief supporting final approval of its settlement with the Plaintiff States.

compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e).[9] The Rule 23 requirements are fully consistent with the long-standing judicial attitude favoring class action settlements. Mayfield v. Barr, 985 F.2d 1090, 1092 (D.C. Cir. 1993). While the Court should "scrutinize the terms of the settlement carefully," the discretion to reject a settlement is thus "restrained by the 'principle of preference' that encourages settlements." Pigford v. Glickman, 185 F.R.D. 82, 103 (D.D.C.1999); see also United States v. District of Columbia, 933 F. Supp. at 47 (" 'The trial court in approving a settlement need not inquire into the precise legal rights of the parties nor reach and resolve the merits of the claims or controversy, but need only determine that the settlement is fair, adequate, reasonable and appropriate under the particular facts and that there has been valid consent by the concerned parties.' ") (quoting Citizens for a Better Env't v. Gorsuch, 718 F.2d 1117, 1126 (D.C. Cir. 1983)).

There is no single test in this Circuit for determining whether a proposed class action settlement should be approved under Rule 23(e), and the relevant factors may vary depending on the factual circumstances. Pigford, 185 F.R.D. at 98 & n.13 (citing Thomas v. Albright, 139 F.3d

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[9] State laws authorizing the Attorney Generals to bring and settle actions as *parens patriae*, like their federal counterpart, section 4C of the Clayton Act, 15 U.S.C. § 15c(a)(1), set forth no specific standards for approving a proposed settlement. Given the fact that courts generally have utilized the Rule 23 standards when evaluating *parens patriae* actions for settlement purposes under the federal statute, see, e.g., New York v. Reebok Int'l, Ltd., 903 F. Supp. 532 (S.D.N.Y. 1995) ("15 U.S.C. § 15c(c) requires court approval of the settlement of a *parens patriae* antitrust suit, but it does not specify the standards required for approval. Courts generally look to thee standards used in approving class action settlements under Rule 23(e) of the Federal Rules of Civil Procedure."), and the fact that eight states in this action are in fact proceeding under Rule 23, see infra pp. 33-36, the Court finds the Rule 23 standards appropriate for evaluating this settlement.

227, 231 (D.C. Cir. 1998)). Generally, in determining whether a settlement should be approved, courts consider whether the proposed settlement "is fair, reasonable, and adequate under the circumstances and whether the interests of the class as a whole are being served if the litigation is resolved by settlement rather than pursued." Manual for Complex Litigation (Third), § 30.42 at 238 (1995). In making this determination, courts in this Circuit have examined the following factors: (a) whether the settlement is the result of arms-length negotiations; (b) the terms of the settlement in relation to the strength of plaintiffs' case; (c) the stage of the litigation proceedings at the time of settlement; (d) the reaction of the class; and (e) the opinion of experienced counsel. See Thomas, 139 F.3d at 231-33; Pigford, 185 F.R.D. at 98-101; Osher v. SCA Realty I, 945 F. Supp. 298, 304 (D.D.C. 1996); Stewart v. Rubin, 948 F. Supp. 1077, 1087 (D.D.C. 1996), aff'd, 124 F.3d 1309 (D.C. Cir. 1997); Pray v. Lockheed Corp., 644 F. Supp. 1289, 1290 (D.D.C. 1986); In re Nat'l Student Marketing Litig., 68 F.R.D. 151, 155 (D.D.C. 1974); see also Moore v. Nat'l Ass'n of Sec. Dealers, Inc., 762 F.2d 1093, 1106 (D.C. Cir. 1985). As set forth below, the Court finds the Mylan Settlement Agreement and the SST Settlement Agreement fair, reasonable, and adequate, and accordingly will approve both settlements.

(a) Arms-Length Negotiations

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.' " In re: Vitamins, 2001 WL 856290, *2 (quoting Manual for Complex Litigation (Third) § 30.42 (1995)). No one has challenged the FTC's and Plaintiff States' representation to the Court that the settlement before it is the product of extensive arms-length negotiations by experienced counsel, undertaken in good faith after substantial factual

investigation and discovery. Indeed, experienced counsel on all sides conducted lengthy and adversarial negotiations, involving numerous face-to-face meetings and telephone conferences, and they exchanged several proposals before reaching the current agreements. The FTC and Plaintiff States further retained experts to aid their evaluation of the potential liability, damages, and fairness of the settlement amounts. See, e.g., Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶¶ 4-30 (detailing analyses and opinion that the settlement is fair, reasonable, and adequate). The Court thus finds that the settlements were ultimately reached through arms-length negotiations.

(b) Terms of Settlement in Relation to Strength of Plaintiffs' Case

Under the Mylan Settlement Agreement, Mylan has agreed to pay $100 million cash in exchange for the release of the claims against it in this matter. Mylan specifically will wire $71,782,017 to a segregated escrow account ("Consumer Fund") to be used for the payment of consumer claims, and it will wire $28,217,983 to another segregated escrow account ("Agency Account") to be used for the payment of state agency claims. See Mylan Settlement Agreement §§ IV.A, VI.A-D. Mylan has further agreed to pay an additional $8 million, which will be wired to another segregated escrow account ("Cost and Fee Account"), to be used for the payment of the Litigating States' attorneys' fees and costs. See id. § IV.B.[10]

Under the SST Settlement Agreement, SST agrees to pay a total of $2 million for the

[10] Together, the Agency Account and the Cost and Fee Account comprise the "State Fund." Mylan Settlement Agreement § I.AA.

release of all claims against it in this action and related actions.[11] Of the $2 million total, $500,000 will be allocated to the Plaintiff States in this case. Specifically, SST will wire $266,250 to a segregated escrow account ("SST Consumer Fund") for the payment of consumer claims, $108,750 to a segregated escrow account ("SST Agency Account") for the payment of state agency claims, and $125,000 to a segregated escrow account ("SST Cost and Fee Account") for the payment of attorneys' fees and costs. See SST Settlement Agreement § III.A-B.

The FTC initially prayed for disgorgement of $120 million in its complaint, and the $100 million that will be recovered through this settlement represents over 80% of that amount. The Plaintiff States' expert estimated total cash damages to consumer purchasers during the monopolization and price-fixing conspiracy, in terms of overcharges, of approximately $111 million, see Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶ 11,[12] and the settlement

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[11] Upon final approval of all settlements, the $2 million will be allocated as follows: (1) $500,000 will go to the settlement in this action; (2) $400,000 will go to the settlements in United Wisconsin and Arkansas Carpenters, discussed below; (3) $500,000 will go the settlement in Advocate Health Care v. Mylan Labs., Inc., No. 99-0790; (4) $100,000 will go to the settlement in the Generic Drug Antitrust Cases: Mylan Generic Drug Antitrust Pharmacy, Judicial Counsel Coordination Proceeding No. 4075 ("Galloway action") (pending in the Superior Court of the State of California for the County of San Francisco); and (5) $500,000 will be divided among the various settlements with up to half of it going toward the notice costs in SST's settlement with the direct purchasers in the Advocate action and the remainder going in three equal parts to the settlement funds in this action, the Galloway action, and the Advocate action. See SST Settlement Agreement § III.A.

[12] The damages estimated by the Plaintiff States' expert are based on the actual overcharge paid by consumers. See Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶¶ 6-9. Although consumers could potentially recover *treble* damages, the standard for evaluating settlement involves a comparison of the settlement amount with the estimated single damages. In re Ampicillin Antitrust Litig., 82 F.R.D. 652, 654 (D.D.C. 1979) ("The recovery of actual single damages must be the basis for the Court's assessment of monetary recovery in an antitrust settlement.") (citing Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974)). Moreover, many states do not permit the recovery of treble damages, and in any event, the recovery of treble damages is far from certain in light of the considerations detailed below.

provides $71,782,017 to consumers who purchased the drugs during the relevant time period, which represents 65% of all estimated consumer damages.[13] The fact that this settlement amount is less than the total estimated damages is not surprising and ultimately does not render the terms of the settlement unfair, unreasonable, or inadequate in the Court's opinion, as several additional factors should be taken into consideration. Continued litigation of these lawsuits would undoubtedly require substantial additional pretrial preparation and expense, as the defendants have denied all liability. Such preparation would likely involve dozens of witnesses, including several experts, and thousands of pages of documents. Further litigation also entails substantial risks; given the defendants' denial of liability, monetary recovery certainly cannot be assumed. Moreover, the defendants have argued that even if they are liable, they can be held responsible only for price increases charged by manufacturers to wholesalers, not for retail price increases, upon which the expert predicated his $111 million estimate. The defendants have further contended that if liable, they can be held responsible only for damages resulting for the time period ending with the termination of the alleged illegal supply agreements, rather than the conclusion of 1999 as used in the expert's estimate. Also, the expert's estimate accounts for the damages suffered in all fifty states and the District of Columbia, yet it is less than certain that all states could have otherwise sought monetary damages, due to the lack of Illinois Brick repealers. All of these factors would operate to reduce the total potentially recoverable damages in this case. See Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶¶ 12-18. Finally, counsel has represented to the Court that based on the number of claimants, which is less than the total

[13] The expert additionally estimated Medicaid damages in the amount of $59.5 million, and as noted above, the Plaintiff States' government agencies will receive $28,217,983. See Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶ 11.

number of consumers allegedly damaged, the claimants are expected to receive reimbursement for the full amount of their damages. See 11/5/01 Mot. at 14-15; 11/29/01 Tr. at 20-21.[14] After considering all of these factors and thoroughly reviewing the representations of counsel and the report of Plaintiff States' expert, see Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶¶ 5-18, the Court finds the terms of the settlement fair, reasonable, and adequate when juxtaposed to the strength of the plaintiffs' case.

(c) Status of the Litigation at the Time of Settlement

Early settlement of these types of cases is encouraged. See, e.g., In re: Vitamins Antitrust Litig., 1999-2 Trade Cas. (CCH) ¶72,726, 1999 WL 1335318, *4 (D.D.C. Nov. 23, 1999) ("The pursuit of early settlement is a tactic that merits encouragement; it is entirely appropriate to reward expeditious and efficient resolution of disputes.") (citing In re Cincinnati Gas & Elec. Co. Sec. Litig., 643 F. Supp. 148, 151 (S .D. Ohio 1986), and Muchnick v. First Fed. Sav. & Loan Ass'n of Philadelphia, 1986 WL 10791, at *3 (E.D. Pa. Sept. 30, 1986)). Courts thus consider whether counsel had sufficient information, through adequate discovery, to reasonably assess the

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[14] As stated by counsel for the Plaintiff States:

> We feel that we can fully pay—and this is based on our expert's analysis and based on the average claim that we think is the actual amount of the claim that's going to be paid—we feel that we can pay up to 250,000 claims at full damage and still have sufficient money to pay all the claims at this point in time. At this point in time we have 244,000 claims, 244,820. Now, these claims have not been verified, and some of them may not be valid, some of them may have been fully reimbursed by insurance of some other things, but those are the total number of claims that we have. . . . At the present time, Your Honor, I mentioned this 244,820 potential claims. We expect to pay those at 100 percent of the calculated damages.

11/29/01 Tr. at 20-21.

risks of litigation vis-à-vis the probability of success and range of recovery. See, e.g., Ressler v. Jacobson, 822 F. Supp. 1551, 1554-55 (M.D. Fla. 1992) (stating that "[t]he law is clear that early settlements are to be encouraged, and accordingly, only some reasonable amount of discovery should be required to make these determinations" and concluding that "the plaintiffs [had] conducted sufficient discovery to be able to determine the probability of their success on the merits, the possible range of recovery, and the likely expense and duration of the litigation") (citing In re Corrugated Container Antitrust Litig., 643 F.2d 195, 211 (5th Cir. 1981), and Cotton v. Hinton, 559 F.2d 1326, 1332 (5th Cir. 1977)); Luevano v. Campbell, 93 F.R.D. 68, 86 (D.D.C. 1981) ("In evaluating the fairness and adequacy of a settlement, it is important to consider whether the settlement was reached after extensive factual development, so that counsel on both sides would have had information sufficient to make a reasonable assessment of their risks of litigation.").

The Court is convinced that the Plaintiff States had sufficient information to adequately assess the risks of this litigation at the time of settlement. Within a few months of the price increases by Mylan, the FTC and Plaintiff States began an investigation, which included subpoenas and hearings conducted by the FTC. After filing lawsuits, they conducted extensive discovery, which included interviewing and deposing over 100 potential witnesses and reviewing thousands of documents. Over the nearly three-year duration of this litigation, the parties obtained a significant amount of information for adequately evaluating the merits of the claims and potential defenses. By entering a settlement agreement prior to summary judgment motions, moreover, the parties avoided significant expense and guaranteed a cash recovery. The Court therefore concludes that the parties had adequate information at the time they entered their

settlement agreements.

(d) Reaction of Class

The Court finds that the settlement group's reaction to this settlement has been overwhelmingly positive and supports approval. After notice was nationally disseminated through newspapers, magazines, television, the Internet, point-of-sale displays at over 55,000 pharmacies, and direct mailings to over 1 million consumers, only nine consumers submitted objections, 2,351 opted out, and approximately 244,820 have submitted claims for refunds. See 11/5/01 Mot. at 18; Affidavit of Jeffrey D. Dahl, 11/5/01 Mot., Tab 2 ¶¶ 18-19; 11/29/01 Tr. at 20-21.

The existence of a relatively few objections certainly counsels in favor of approval, see, e.g., New York v. Keds Corp., 1994-1 Trad Cas (CCH) ¶70,549, 1994 WL 97201, at *2 (S.D.N.Y. Mar. 21, 1994) ("Given th[e] sales volume, the paucity of objections and statements of preference revealed by the record militates in favor of the settlements . . . ."),[15] and after reviewing each one of them, the Court can find no impediment to approval. While the Court appreciates the objections, several of them can be dispensed with expeditiously. Ms. Dorothy Bran filed an objection stating merely that she "object[s] to the settlement," and Ms. Verna Parks similarly objected to class actions generally. Without significant elaboration on their positions,

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[15] The Court also finds no reason to disapprove the settlement stemming from the 2,351 opt-outs. This number is relatively low, representing a mere 0.2% of the 1,281,128 recipients of notice (0.2%) or approximately 1% of the 244,820 claimants. Cf., e.g., Pigford v. Glickman, 185 F.R.D. 82, 102 (D.D.C. 1999) (finding 5% to be a "low rate of opt-outs" when 85 farmer class members elected to opt out of the class after 1686 completed claim packages). The number more likely reflects the sufficiency and ultimate success of the notice more than some general dissatisfaction with the settlement, which is evidenced by the relatively low number of opt-outs and the relatively low number of objections filed.

needless to say, such broad statements are of little aid to the Court in determining whether these settlements are fair, adequate, and reasonable. Messrs. W.C. Roehl and Herbert Goldman objected to the settlements because the retail cost of drugs is the same today. As a general matter, their point is well taken. But no illegal conduct by retail drug stores was alleged in this lawsuit. It does not, therefore, affect retailers, only generic manufacturers. Mr. Kenneth O'Mara objected to the settlements out of a fear that there would be a lack of refunds for variable co-pay purchases of the drugs. But as the FTC and Plaintiff States point out, consumers with variable co-pays are eligible to receive reimbursement and with valid claims will recover the same percentage as consumers who paid cash. See infra note 18. Finally, Ms. Toba Olson, represented by counsel Lawrence W. Schonbrun, filed a notice of her desire "to reserve her right to appear for the purpose of speaking in favor of class counsel's request for an attorneys' fee award of $8,125,000 in the instant litigation," but also expressed confusion about the meaning "Related Litigation" and thus objected to the $4 million to be allocated to Co-Lead Counsel, until she could better understand where the money would be spent. Counsel for the plaintiffs thoroughly explained these fees at the fairness hearing, and Ms. Olson did not appear to contest their representations or elaborate upon her objections. The Court is satisfied that the fees are reasonable. See infra pp. 28-30.

Several more substantial, yet unavailing, objections were filed by Ms. Cathy Shirley, Mr. Ronald Weintraub, and Ms. Lillie Mae Boone. They objected to the Mylan settlement on the bases that the published notice is deficient as it does not inform class members of the size of the class and provides ambiguous information about the value of the settlement benefits, the claim form requirements pose an undue burden on class members, the settlement amount is inadequate

considering the allegations of Mylan's pricing policies, and the proposed distribution plan is unfair because it allows for *cy pres* distribution. However, there is no requirement that the class size be specified in the notice, see, e.g., Vancouver Women's Health Collective Soc. v. A.H. Robins Co., 820 F.2d 1359, 1364 (4th Cir. 1987) ("[T]he right to adequate notice simply requires that the proposed form of notification be reasonably certain to inform those affected."), and the objectors fail to explain how omitting the class size otherwise affected the adequacy of the notice. The objectors' contentions about ambiguity in the value of the settlement are incredible in light of the fact that the notice explains that the defendants will pay $100 in cash for full and final settlement of legal claims and that $71 million of that amount has been deposited for consumer distribution, notice, and claims administration costs, and that $28 million has been set aside to reimburse state agencies. The Court also has significant difficulty understanding how the claim form—which required claimants only to write down their name, address, date of birth, social security number, answer five "yes or no" questions in order to help them assess their eligibility, sign, date, attach proof of purchases, and drop the claim in the mail in the postage prepaid envelope provided—is too burdensome.[16] As discussed in the preceding section, the objectors' claim concerning the inadequacy of the settlement amount is unavailing, as the terms of the settlement are fair, reasonable, and adequate when juxtaposed to the strength of the plaintiffs' case. See Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998) ("The court should not reject a settlement merely because individual class members complain that they would have received more had they prevailed after a trial."). Finally, counsel for the Plaintiff States satisfactorily

[16] Consumers who received notice and waiver materials directly from the pharmacies did not have to take even these steps.

explained at the fairness hearing that the *cy pres* distribution will take place only in the event that funds still remain after payment of all consumer claims, and if it is utilized, the money cannot be sent to a charity, but must be used to benefit consumers of these types of purchases, such as at hospice centers. See 11/29/01 Tr. at 52-53; Consumer Distribution Plan, 11/5/01 Mot., Tab 3 at 3; see also infra p. 20. The Court sees no fatal flaw with such a plan.

Finally, Mr. Weintraub, through his counsel Edward Cochran, raised two additional objections for the first time at the fairness hearing. See 11/29/01 Tr. at 7, 31-32, 43-49. He first objects to paying the eighteen Joining States $1 million. He believes, based on the Plaintiff States' expert report concerning the damages calculation and allocation of the settlement fund, see Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶¶ 19-28, that the $1 million payment to the Joining States unfairly diminishes the consumer fund by $720,000, because that would be the percentage share (that is, approximately seventy-two percent) otherwise available for consumer claims. See 11/29/01 Tr. at 44-45, 54-55. But as explained by the Plaintiff States at the fairness hearing, the $1 million payment to the Joining States was a necessary component for the settlement; the Litigating States were required to exert their best effort to bring in the eighteen Joining States, and the $1 million offer for those states' agency claims was the inducement that brought them in and completed the settlement. See 11/29/01 Tr. at 49-51, 82-83. The record supports the Litigating States' position on this issue, and the expert's report is clear in the calculations, indicating that the Litigating States would receive $27.2 million with the Joining States receiving $1 million. The Court therefore does not find the settlement unfair, unreasonable, or inadequate upon Mr. Weintraub's first objection.

Mr. Weintraub's second objection is that the expert excluded percentage co-pays from all

his calculations of damages. The problem with this exclusion, he contends, is not that the consumers with percentage co-pays will not be paid, but that the damages calculation is undervalued. See id. at 45-47, 54-55.[17] The Court appreciates the point raised by Mr. Weintraub, but finds it insufficient to compel a conclusion that the settlement reached is unfair, unreasonable, or inadequate. The Plaintiff States' expert excluded percentage co-payment policies from the damages calculation only after considering them and specifically opining that "the impact of this group on an assessment of the reasonableness of the settlement is *de minimis*." Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶ 9 n.3. He based this conclusion on a survey of insurance agencies conducted by the Plaintiff States, which revealed that the majority of the agencies do not offer percentage co-payment plans, and of those that do, all but one claim less than one percent of their customers has percentage co-payment plans. Even assuming a one-percent population of co-pays, the expert estimated that the damages for this group is only 0.2% of the estimated damages to third-party payers. Id. The Court finds his conclusion that such damages are *de minimis* for the purposes of evaluating the fairness of the settlement reasonable. The damages analysis conducted by the expert is not an exact science; as he details in his report, many assumptions and mitigating factors must be taken into account in evaluating the fairness of the settlement amount in light of other concerns such as the risks of litigation. See id. ¶¶ 6-10, 12-18. For all these reasons, therefore, the Court ultimately concludes that the reaction of the class favors final approval.

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[17] He specifically points out that if consumers with percentage co-pays occupy one percent of the market, that represents $1 million of the $100 million settlement. He also speculates "that the percentage co-pay may, indeed, be significantly larger than one percent of the market." 11/29/01 Tr. at 46.

(e) Opinion of Experienced Counsel

Counsel for the FTC, Plaintiff States, and the defendants have considerable expertise in complex antitrust and class action litigation. Opinion of experienced and informed should be afforded substantial consideration, see, e.g., New York v. Reebok Int'l, Ltd., 903 F. Supp. 532 (S.D.N.Y. 1995), and particularly here, the Court may place greater weight on such opinion in addressing a settlement negotiated by government attorneys committed to protecting the public interest. Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980) ("[T]he participation in the negotiations resulting in the proposals by a government agency committed to the protection of the public interest and its endorsement of the agreement are additional factors which weigh heavily on the side of approval of the settlement."); see In re Toys "R" Us Antitrust Litig., 191 F.R.D. 347, 351 (E.D.N.Y. 2000) ("Moreover, the participation of the State Attorneys General furnishes extra assurance that consumers' interests are protected."). Given counsel's experience, the extensive discovery and lengthy arms-length negotiations conducted in this case, and the information known to counsel at the time they reach the settlement agreements, the Court will credit counsel's opinion that these settlements are fair, reasonable, and adequate.

(2) Final Approval of Plaintiff States' Distribution Plans

The Plaintiff States have proposed two distribution plans, which the Court will also approve. Under the Consumer Distribution Plan, $66,782,017 from the Mylan Settlement Agreement and $266,250 from the SST Settlement Agreement will be available for compensating

consumer claims. See Consumer Distribution Plan, 11/5/01 Mot., Tab 3 at 1, 4.[18] A consumer claims procedure is being administered by Rust Consulting, under which submitted claim forms are examined together with supporting purchase documentation, and when incomplete forms are received, a request for additional information is mailed to the claimant. See id. After final validation of all claims, Rust Consulting will prepare a Monetary Distribution Report for the Court's review. See id.; Affidavit of Jeffrey D. Dahl, 11/5/01 Mot., Tab 2 ¶¶ 25. If the Court grants approval of the Distribution Order, Rust Consulting will distribute the settlement award to the consumers. If monies remain after that distribution, the Plaintiff States will employ *cy pres* distribution among the thirty-three Litigating States, based on each of the states' respective percentages of the estimated consumer damages, and each Attorney General will distribute its share to the State, a political subdivision thereof, and/or a charitable organization, with the express condition that "the funds be used in a manner reasonably targeted to specifically benefit the health care needs of a substantial number of the persons injured by the increased prices of lorazepam and/or clorazepate. Consumer Distribution Plan, 11/5/01 Mot., Tab 3 at 3; 11/29/01 Tr. at 52-53.

Under the Government Distribution Plan, $28,217,983 from the Mylan Settlement Agreement and $108,750 from the SST Settlement Agreement will be available for all state agency compensation. The eighteen Joining States will receive a total of $1 million. Each

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[18] Two categories of consumers are eligible for reimbursement. The first are unreimbursed or cash customers, and the second are insured consumers with variable or percentage copayments. Consumers with Medicaid coverage for prescription drugs, or insurance for prescription drugs with a fixed co-pay amount, would not be eligible for refunds, as they suffered no financial harm, but will benefit from the injunctive relief obtained. See 11/5/01 Mot. at 31-33; Consumer Distribution Plan, 11/5/01 Mot., Tab 3 at 2-3.

Joining State will receive a base amount of $10,000, with the remaining $820,000 apportioned among the Joining States on the basis of each state's percentage of the total estimated governmental damages. The remaining $27 million will be allocated to the thirty-three Litigating States based on the respective damages to each state's agencies. Ninety-five percent of the total amount (that is, approximately $25 million) will be allocated as a share of total estimated Medicaid damages to each state's agencies. The other five percent (that is, approximately $1,300,000) will be allocated to non-Medicaid-related damages based on state population. Finally, the interest generated from the fund will be distributed to all the states as a proportion of Medicaid damages. See Government Distribution Plan, 11/5/01 Mot., Tab 4 at 1-3.

As with settlement agreements, courts consider whether distribution plans are fair, reasonable, and adequate. In re Chicken Antitrust Litig., 669 F.2d 228, 238 (5th Cir. 1982). The overall distribution between the consumers and state agencies has been structured to allocate money in equal proportion to their respective estimated harm. See Affidavit of Laurits R. Christensen, 11/5/01 Mot., Tab 5 ¶ 22. Settlement distributions, such as this one, that thus apportion funds have been repeatedly deemed fair and reasonable. See, e.g., Beecher v. Able, 575 F.2d 1010, 1013-14 (2d Cir. 1978); In re Chicken, 669 F.2d at 240-42. And here, the Consumer Distribution Plan is manifestly fair and adequate because it will likely reimburse consumers in the full amount of their estimated damages. In the unexpected event that the fund is insufficient to fully cover all claims, each claimant's recovery will be ratably reduced based on the ratio of the settlement amount to the total amount of consumer claims, which is a reasonable approach.

The Court also finds the Government Distribution Plan fair, reasonable, and adequate.

Under state law, the Attorney Generals represent their state agencies in all litigation, and may settle and release their agency's claims. Because they are not before the Court under *parens patriae* statutes with respect to their agency's claims, therefore, the Court need not approve the Government Distribution Plan. The parties have nonetheless asked for this Court's approval, and the Court finds the plan fair and adequate because it allocates settlement funds among the Litigating States and among the Joining States based on their respective percentages of estimated damages, and the greater monetary fund provided to the Litigating States is premised reasonably upon the greater commitment of resources and risks undertaken by them in this litigation. The Court therefore will approve the distributions plans.

(3) Final Approval of Payment of Notice Costs and Claims Administration

Plaintiff States used Rust Consulting and Kinsella Communications to provide extensive notice through television, newspaper, and magazine advertisements, an Internet website, toll-free telephone lines, point-of-sale displays at pharmacies, and direct mail to over 1 million individuals. See 11/5/01 Mot. at 41-52; Affidavit of Katherine Kinsella, 11/5/01 Mot., Tab 1 ¶¶ 8-20; Affidavit of Jeffrey D. Dahl, 11/5/01 Mot., Tab 2 ¶¶ 7-17, 27-29. After careful review of their extensive efforts, the Court finds that they constitute "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Fed. R. Civ. P. 23(c)(2). The Plaintiff States and Rust Consulting expended significant efforts working with some of the nation's largest pharmacy chains to provide direct mail notice to as many customers as could be reasonably identified. See Affidavit of Jeffrey D. Dahl, 11/5/01 Mot., Tab 2 ¶ 11; see also 11/29/01 Tr. at 22-23. The Plaintiff States, Rust Consulting, and Kinsella Communications made similar extensive efforts to notify settlement

group members who could not be notified directly, by compiling relevant specific demographic statistics, and targeting accordingly the use of media including magazines, newspapers, television, an Internet website, press releases, toll-free telephone lines, and pharmacy point-of-sale displays.[19]

The cost of this notice plan and the claims administration is estimated at $8,250,000. See Affidavit of Mitchell L. Gentile, 11/5/01 Mot., Tab 6 ¶¶3-10; see also Consumer Distribution Plan, 11/5/01 Mot., Tab 3 at 4. This figure exceeds the $5 million originally estimated and preliminarily approved for such costs. The Plaintiff States justify the increased cost estimate by averring two factors that necessitated the increased expense. First, the extensive cooperation provided by the pharmacies in the direct mailing campaign added significant mailing costs and reimbursement expenses incurred by the pharmacies in computer programming to extract qualifying purchase records from pertinent databases. Second, the greater response from the direct notice campaign and from television advertising required additional staff for the claims administrator to field calls, process waivers, pharmacy records, and claim forms, and respond to the unusual amount of correspondence from consumers. See 11/5/01 Mot. at 42-43; Affidavit of Jeffrey D. Dahl, 11/5/01 Mot., Tab 2 Ex. XIV. More important to the Court, the Plaintiff States explain that the sum available for distribution to consumers will remain virtually "unaltered" from the amount preliminarily approved, because the estimated $3 million earned in interest on

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[19] The results were impressive when viewed through the final reach and frequency numbers. For example, 96.2% of women fifty-five years or older were reached with an average of 7.0 opportunities to see the notice, 96.5% of women sixty-five years or older were reached with an average of 8.2 opportunities to see the notice, and 93.2% of adults thirty-five years or older were reached with average 5.4 opportunities to see the notice. See Affidavit of Katherine Kinsella, 11/5/01 Mot., Tab 1 ¶ 13; see also 11/29/01 Tr. at 25-26.

the consumer fun will cover this unexpected increase in expense. 11/5/01 Mot. at 50-51; see 11/29/01 Tr. at 27. And to the Plaintiff States' credit, the number of consumers submitting claims for refunds was increased nearly ten-fold over that which was anticipated at the time of preliminary approval. Overall, the Court finds the cost of such extensive notice efforts, which have been well documented in the affidavits filed in conjunction with the motion for final approval, reasonable.

(4) Final Approval of Attorneys' Fees and Costs

Courts have a duty to ensure that claims for attorneys' fees are reasonable. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1265 (D.C. Cir. 1993).[20] The D.C. Circuit has joined other circuits in "concluding that a percentage-of-the-fund method is the appropriate mechanism for determining the attorney fees award in common fund cases." Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271 (D.C. Cir. 1993). Proponents find the percentage-of-recovery method attractive "because it directly aligns the interests of the Class and its counsel for the efficient prosecution and early resolution of litigation, which clearly benefits both litigants and the judicial system." In re Am. Bank Note Holographics, Inc. Sec. Litig., 127 F. Supp. 2d 418, 431-32 (S.D.N.Y. 2001). While fee awards in common fund cases range from fifteen to forty-five percent, the normal range of fee recovery

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[20] As the D.C. Circuit has explained:

> Special problems exist in assessing the reasonableness of fees in a class action suit since class members with low individual stakes in the outcome often do not file objections, and the defendant who contributed to the fund will usually have no interest in how the fund is divided between the plaintiffs and class counsel.

Swedish Hosp., 1 F.3d at 1265.

in antitrust suits is twenty to thirty percent of the common fund. See Swedish Hosp. Corp., 1 F.3d at 1271-72; see also In re Aetna Inc., MDL No. 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) (finding thirty percent to constitute a reasonable award); In re Ampicillin Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that while the bulk of fee awards in antitrust cases are less than twenty-five percent, several courts have awarded more than forty percent of the settlement fund). In cases regarded as "mega-fund" cases—that is, recoveries of $100 million or more—fees of fifteen percent are common. See Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp 2d 942, 989 (E.D. Tex. 2000) (surveying cases decided between 1993 and 1999).

While this Circuit has not yet developed a formal list of factors to be considered in evaluating fee requests under the percentage-of-recovery method, other jurisdictions have delineated factors that courts should consider in evaluating fee requests. For example, the court in Gunter v. Ridgewood Energy Corp., 223 F.3d 190 (3d Cir. 2000), set forth several factors including: "(1) the size of the fund created and the number of persons benefitted; (2) the presence or absence of substantial objections by members of the class to the settlement terms and/or fees requested by counsel; (3) the skill and efficiency of the attorneys involved; (4) the complexity and duration of the litigation; (5) the risk of nonpayment; (6) the amount of time devoted to the case by plaintiffs' counsel; and (7) the awards in similar cases." Id. at 195 n.1 (citing In re Prudential, 148 F.3d 283, 336-40 (3d Cir. 1998)); In re GM Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 819-22 (3d Cir. 1995)). And the Tenth Circuit considers what has been called "the twelve Johnson factors," namely:

> [T]he time and labor required, the novelty and difficulty of the question presented by the case, the skill requisite to perform the legal service properly, the preclusion of other employment by the attorneys due to acceptance of the case, the customary fee,

> whether the fee is fixed or contingent, any time limitations imposed by the client or the circumstances, the amount involved and the results obtained, the experience, reputation and ability of the attorneys, the 'undesirability' of the case, the nature and length of the professional relationship with the client, and awards in similar cases.

Rosenbaum v. Macallister, 64 F.3d 1439, 1445 (10th Cir. 1995) (listing factors from Johnson v. Ga. Highway Express, 488 F.2d 714, 717-19 (5th Cir. 1974)).

There are two fees and costs petitions before the Court. In the first petition, the Plaintiff States seek approval of up to $8,125,000 in attorneys' fees and costs. Approximately $6.8 million of that figure will go toward attorneys' fees and $1.3 million will be used to reimburse out-of-pocket expenses.[21] Neither Mylan nor SST objects to the fees and costs submission, see Affidavit of Andrew E. Aubertine ¶ 7, 11/5/01 Mot., Tab 7; see also 11/29/01 Tr. at 33-34, and the Court finds the request reasonable and will accordingly approve it for the following reasons.

Respecting the attorneys' fees petition, the Plaintiff States have detailed the lodestar approach they used to arrive at the $6.8 million fee figure. See Affidavit of Andrew E. Aubertine ¶¶ 9-21, 11/5/01 Mot., Tab 7; see also 11/29/01 Tr. at 34-35. They assembled a Fees and Costs Committee that utilized a four-step approach to arrive at a figure of $6.4 million for the hours of the states' attorney and staff time spent in this case up to the point of settlement in August 2000. The Committee collected information concerning the hours worked by attorneys and litigation support personnel, established hourly market rates for various classes of attorneys and litigation support staff based on experience, reduced the time submitted to account for possible inefficiencies and duplication of effort, and applied the relevant hourly rates to the remaining

[21] Mylan agreed to contribute up to $8 million for fees and costs, and the Plaintiff States now specifically seek $7,985,947.58. SST agreed to contribute $100,000 toward fees and $25,000 toward costs.

attorney staff hours. See Affidavit of Andrew E. Aubertine ¶¶ 10,13-20, 11/5/01 Mot., Tab 7. The Plaintiff States additionally set aside $400,000 to reimburse the leadership contribution of certain states and to partially reimburse them for over 5,000 hours of attorney and staff time spend since August 2000. See id. ¶¶ 12, 21. Viewed as a percentage of the common fund, the reasonableness of the fees sought is clear. The $6.8 million fee figure represents less than seven percent of the settlement fund, which is well within the acceptable range of fee recoveries in antitrust suits in which there is a common fund. See supra p. 24 (citing In re Am. Bank Note Holographics, Inc. Sec. Litig., 127 F. Supp. 2d at 431-32, In re Aetna Inc., MDL No. 1219, 2001 WL 20928, In re Ampicillin Antitrust Litig., 526 F. Supp. at 498, and Shaw, 91 F. Supp. 2d at 989); see also, e.g., Bebchick v. Washington Metro. Area Transit, 805 F.2d 396, 405 (D.C. Cir 1986) (approving as reasonable attorneys' fees totaling twenty-five percent of common fund); Swedish Hosp. Corp. v. Shalala, 1 F.3d 1261, 1271-72 (D.C. Cir. 1993) (approving as reasonable attorneys' fees totaling twenty percent of common fund). Moreover, the $8 million Mylan contribution toward the $8,125,000 total in fees and costs requested was negotiated separately and is independent of the total common fund. It therefore will not reduce the fund at all if awarded. Affidavit of Andrew E. Aubertine, 11/5/01 Mot., Tab 7 ¶ 8. And even though the $125,000 contribution from SST will be taken from the $500,000 total it will contribute toward settlement of the Plaintiff States' claims, it represents less than a mere 0.125% of the $100,500,000 total settlement amount. For these reasons, the fees sought are even more reasonable, and the Court previously has approved similarly structured fee arrangements. See, e.g., In re: Vitamins Antitrust Litig., 2000-1 Trade Cas. (CCH) ¶72,862, 2000 WL 1737867, at *2 n.3 (D.D.C. Mar. 31, 2000) ("The separate fund for attorneys fees provides the class with

greater certainty as to what each class member would receive from the Settlement, because the amount that class plaintiffs receive is not reduced by the award of attorneys' fees.").

The States have also submitted a detailed accounting of the expenses for which they now seek a reimbursement of approximately $1.3 million. See Affidavit of Andrew E. Aubertine ¶¶ 22-26 & Ex. B, 11/5/01 Mot., Tab 7; see also 11/29/01 Tr. at 35-36. After careful review of the affidavit detailing the costs, the Court finds that the Plaintiff States reasonably expended the claimed amount on experts' time to prepare liability and damages analyses, data for the experts' analyses supplied by IMS Health, Inc., depositions and transcripts, travel, photocopying and postage, long distance telephone charges, and legal research charges. The Court accordingly finds the costs request reasonable.

In the second attorneys' fees and costs petition, a separate set of plaintiffs, the State Purchaser Plaintiffs, seek approval of $4 million.[22] Mylan has agreed to pay $4 million in fees and costs—beyond the $100 million for consumer and state agency claims and the $8 million for the Plaintiff States' fees and costs—to the firms of Zwerling Schachter & Zwerling LLP and Goodkind Labaton Rudoff & Sucharow LLP ("Indirect Purchaser Lead Counsel") on behalf of private counsel who participated in the prosecution and resolution of the State Purchaser

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[22] On April 27, 2001, the Court granted a stipulated motion for limited intervention by named plaintiffs ("State Purchaser Plaintiffs") in several related state court indirect purchaser actions ("State Purchaser Actions"). That order specifically permitted the State Purchaser Plaintiffs to intervene in the Plaintiff States' action for the limited purpose of commenting on the settlement and petitioning for the award of agreed-upon attorneys' fees and costs. As a result of the Plaintiff States' third amended complaint, the State Purchaser Plaintiffs became members of the "Settlement Group," which has agreed to release all state and federal law claims against the defendants, including the claims asserted by the State Purchaser Plaintiffs in their state court consumer class actions.

Actions.[23] As pointed out by Indirect Purchaser Lead Counsel, the efforts of private counsel for the State Purchaser Actions contributed significantly to the FTC and Plaintiff States' settlement. After today's approval of the FTC/Plaintiff States' settlement, the parties will jointly seek dismissal of the State Purchaser Actions, and private counsel for the State Purchaser Actions will seek no further fees or reimbursement of expenses. See 4/16/01 Stipulation of Settlement and Dismissal at 6-7; see also 11/29/01 Tr. at 30, 27-41. The $4 million figure is the result of adversarial, arms-length negotiations, and like the $8 million fee for the Plaintiff States, the negotiated figure is independent of the consumer fund, which means that the recovery for consumers will not be diminished if it is awarded. See 11/5/01 Mot. at 15, 18-19. Also reminiscent of the $8 million award for the Plaintiff States, the $4 million award is reasonable when viewed as a percentage of the recovery. It represents a mere 5.55% of the $72 million fund for consumer claims. Combined with the Plaintiff States' $8 million, the aggregate award amounts to 13.5% of the fund, which is also well within the acceptable range of fee recoveries in antitrust suits in which there is a common fund.[24] Moreover, the reasonableness of the requested

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[23] Since 1998, a total of 41 law firms have prosecuted indirect purchaser lawsuits against the defendants on an entirely at-risk contingency fee basis. On March 9, 2000, the Court appointed Zwerling Schachter & Zwerling LLP and Goodkind Labaton Rudoff & Sucharow LLP as co-lead counsel to orchestrate and coordinate the efforts of counsel for these indirect purchaser actions. See generally Manual for Complex Litigation (Third), § 20.22 (1995). The $4 million will be shared by all these firms. See 11/29/01 Tr. at 163, 166-67.

[24] Even more accurate percentages, perhaps, can be extracted if one accounts for the fact that consumers will receive 100% of the fund that has been designated for their claims. Because of that fact, the attorneys' fees and costs allocated to the Plaintiff States and State Purchaser Plaintiffs can be added to the consumer fund before considering the relative percentages. Viewed through this lens, the total fund would be $81,812,128—that is, $72,048,267 (for consumer claims) plus $5,763,861 (for Plaintiff States' fees and costs calculated as a proportionate eight-percent share of the consumer fund) plus $4,000,000 (for State Purchaser Plaintiffs' fees and costs). Of that total, $4,000,000 amounts to 4.88% and $5,763,861 amounts

amount is confirmed when cross-checked with the lodestar approach. Counsel has submitted affidavits detailing the significant effort exerted on behalf of the indirect purchaser actions related to this petition. Forty-one firms prosecuting the indirect purchaser actions have collectively devoted more than 25,000 hours of professional time amounting to an aggregate lodestar of $8,277,762.73. See 11/15/01 Affidavit of Robert S. Schachter ¶ 6. As pointed out by counsel, if this $4 million petition is awarded along with the fees sought in United Wisconsin and Arkansas Carpenters, discussed below, the resulting multiplier would be less than a modest 1.3. The Court concludes that the fee is reasonable.

The Court additionally finds the costs request reasonable. As detailed in filed affidavits and through representations at the fairness hearing, counsel has demonstrated that they advanced total litigation costs and expenses of $779,148.51 for consulting and retaining experts, reviewing hundreds of thousands of documents, creating and maintaining a comprehensive computer database, and the like. See 11/15/01 Affidavit of Robert S. Schachter ¶ 8; see also 11/29/01 Tr. at 40. Approximately ten percent of the $4 million sought here will be used to reimburse expenses, and counsel has attributed half of these expenses to the State Purchaser Actions and half to the United Wisconsin and Arkansas Carpenters Actions. Accordingly, $389,874.26 will be reimbursed from the $4 million recovered in this request. See 11/15/01 Affidavit of Robert S. Schachter ¶ 8; 11/5/01 Mot. at 24 & n.22; 11/29/01 Tr. at 40. After careful review of the State Purchaser Plaintiffs' attorneys' fees and costs petition, and the affidavits submitted and representations of counsel in support thereof, the Court finds the petition reasonable and will approve it.

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to 7.02%, for an aggregate 11.9%.

(5) *Parens Patriae* Authority and Class Certification

For the purposes of settlement, the states can be divided into two groups. The first is a group of forty-three states that have specific authority to represent consumers and to settle and release their claims pursuant to their respective *parens patriae* (or equitable equivalent) authority. The Court preliminarily found that they had such authority on April 27, 2001. Those states now seek a final ruling that each state has authority to represent consumers and to settle and release their claims. No one has challenged such authority, and the Court finds that they have been granted such authority. Fourteen of these states—California, Colorado, Delaware, the District of Columbia, Hawaii, Idaho, Massachusetts, Nevada, Ohio, Oregon, Rhode Island, South Dakota, Utah, and West Virginia—have expressly conferred *parens patriae* authority. See Cal. Bus. & Prof. Code § 16760; Colo. Rev. Stat. § 6-4-111; Del. Code Ann. tit. 6, § 2108; D.C. Code § 28-4507(b); Haw. Rev. Stat. § 480-14(c); Idaho Code § 48-108(2)-(4); Mass. Gen. Laws Ann. ch. 93, § 9; Nev. Rev. Stat. § 598A.160(1); Ohio Rev. Code Ann. §109.81(A); Or. Rev. Stat. § 646.775; R.I. Gen. Laws § 6-36-12; S.D. Codified Laws §§ 37-1-23 through -32; Utah Code Ann. §§ 76-10-916, 76-10-918; W. Va. Code § 47-18-17. Sixteen states—Alaska, Arizona, Florida, Illinois, Kansas, Maryland, Mississippi, New Hampshire, New York, North Carolina, North Dakota, Pennsylvania, Vermont, Virginia, Wisconsin, and Wyoming—have express statutory authority to represent consumers in a capacity which is the functional equivalent of *parens patriae*. See Alaska Stat. §§ 45.50.501(a)-(b), 45.50.580(a)-(b); Ariz. Rev. Stat. Ann. §§ 44-1407, 44-1412; Ariz. Const. art. XIV, § 15; Fla. Stat. Ann. § 542.27(2); 740 Ill. Comp. Stat. 10/7(2); Kan. Stat. Ann. §§ 50-103(a)(8), 50-148(b); Md. Code Ann., Com. Law § 11-209; Miss. Code Ann. §§ 7-5-1, 75-21-37, 75-21-39, and 75-24-1; N.H. Rev. Stat. Ann. §§ 356:4-a, -b, and -

c; N.Y. Exec. Law §63(12); N.C. Gen. Stat. §§ 114-2(8)(a), 75-9 through -16.1; N.D. Cent. Code § 51-08.1-07; 71 Pa. Cons. Stat. Ann. § 732-204(c); Vt. Stat. Ann. tit. 9, § 2458(b)(2); Va. Code Ann. §§ 59.1-9.15(a)-(d), 59.1-9.17; Wis. Stat. Ann. §§ 133.16, 133.17(1); Wy. Stat. §§ 40-12-105, 40-12-106, and 40-12-107. Thirteen states—Alabama, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, New Jersey, New Mexico, Tennessee, Texas, and Washington—have had state and/or federal courts interpret statutory provisions to effectively grant *parens patriae* authority or have determined that their attorney general has such authority under state common law. See Weaver v. Blue Cross and Blue Shield of Alabama, 570 So. 2d 675, 684 (Ala. 1990); Ky. Rev. Stat. Ann. § 367.200; Kentucky ex rel. Beshear v. ABAC Pest Control, Inc., 621 S.W.2d 705 (Ky. Ct. App. 1981); State v. Bordens, Inc., 684 So. 2d 1024, 1026 (La. Ct. App. 1996); Lund ex rel. Wilbur v. Pratt, 308 A.2d 554, 558 (Me. 1973); Me. Rev. Stat. Ann. tit. 5, § 209; State v. Lumberman's Ass'n, Inc., 1979-2 Trade Cas. (CCH) ¶62,990, 1979 WL 18703, at *6 (Mich. Cir. Ct. Oct. 29, 1979); Kelley v. Carr, 442 F. Supp. 346, 356-57 (E.D. Mich. 1977); Kelley v. Sclater, 40 B.R. 594, 596-97 (E.D. Mich. 1984); Humphrey v. Ri-MEL, Inc., 417 N.W.2d 102, 112 (Minn. Ct. App. 1988); Minnesota v. Standard Oil Co., 568 F. Supp. 556, 563 (D. Minn. 1983); Mo. Rev. Stat. §§ 27.060, 416.061; Clark Oil & Ref. Corp. v. Ashcroft, 639 S.W.2d 594, 596 (Mo. 1982) (*en banc*); Mont. Code Ann. § 30-14-222(1); State ex rel. Olsen v. Public Serv. Comm'n, 283 P.2d 594, 599 (Mont. 1955); N.J. Stat. Ann. §§ 56:9-12.b; O'Regan v. Schermerhorn, 50 A.2d 10, 15 (N.J. Sup. Ct. 1946); Hyland v. Kirkman, 385 A.2d 284, 290 (N.J. Super. Ct. Ch. Div. 1978); N.M. Stat. Ann. §§ 8-5-2, 57-1-7, and 57-1-8; New Mexico v. Scott & Fetzer Co., 1981-2 Trade Cas. (CCH) ¶64,439, 1981 WL 2167, at *1 (D.N.M. Dec. 22, 1981); Tenn. Code Ann. § 8-6-109(b)(1); State v. Heath, 806 S.W.2d 535, 537

(Tenn. Ct. App. 1990); State ex rel. Inman v. Brock, 622 S.W.2d 36, 41 (Tenn. 1981); Tex. Bus & Com. Code Ann. §§ 15.04, 15.20; Abbott Labs. v. Segura, 907 S.W.2d 503, 505 (Tex. 1995); Texas v. Scott & Fetzer Co., 709 F.2d 1024, 1027 (5th Cir. 1983); Bachnysky v. State, 747 S.W.2d 868, 870 (Tex. Civ. App. 1988); Wash. Rev. Code § 19.86.080; State v. Taylor, 58 Wash. 2d 252, 255-56 (1961); In re Ins. Antitrust Litig., 938 F.2d 919, 927 (9th Cir. 1991), rev'd on other grounds sub nom. Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993).

The second set is comprised of eight states—Arkansas, Connecticut, Georgia, Indiana, Iowa, Nebraska, Oklahoma, and South Carolina—that represent their respective citizen-consumers pursuant only to Federal Rule of Civil Procedure 23 and therefore seek certification of a settlement class defined as follows:

> All natural person consumers within Plaintiff States where such a class action may be brought, not otherwise represented by the Plaintiff States as *parens patriae*, who purchased generic lorazepam and/or clorazepate sold in the United States from January 1, 1998 through December 31, 1999.

The Court conditionally certified this class on April 27, 2001, and the states now seek final certification for settlement purposes only.[25]

A settlement class certification must comply with all four prerequisites of Rule 23(a) and one of the three subsections of Rule 23(b). See Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998). Rule 23(a) permits certification only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the

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[25] In addition to the eight noted states, the attorneys general of Alaska, California, Florida, Illinois, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nevada, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Virginia, Wisconsin, and Wyoming also seek certification under Federal Rule of Civil Procedure 23 as well as their respective state's *parens patriae* or equivalent authority.

claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. Proc. 23(a).

All four requirements of Rule 23(a) are satisfied here. First, even if based only upon the more than 244,820 consumers that have already submitted claims for refunds, the numerosity requirement has been met; this large number clearly renders joinder impracticable. Second, antitrust actions typically present common questions of law and fact, and here, all claims derive from the same set of facts. Third, the state agencies' and consumers' claims are typical because they arose at the same time in the same market and are based on the same theory of damages. Finally, the attorneys generals of the plaintiff states have no conflicting interests with the consumers and agencies they represent, have evidenced a genuine interest in this litigation, and are qualified and experienced. See, e.g., In re Ampicillin Antitrust Litig., 55 F.R.D. 269, 274 (D.D.C. 1972) ("And the Court is persuaded that the states and cities, acting through their attorneys general and chief law officers respectively, are the best representatives of the consumers residing within their jurisdictions.").

With respect to Rule 23(b), the plaintiffs have moved for certification under both Rule 23(b)(1) and Rule 23(b)(3). Rule 23(b)(1) requires that "separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct of the party opposing the class." Fed. R. Civ. P. 23(b)(1). As the Plaintiff States point out, there are thousands of class members located in every jurisdiction in the country, and the claims are factually and legally complex. Thus, the Court finds a great risk of inconsistent adjudications if

the class is not certified. Rule 23(b)(3) requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). The Rule further provides that matters pertinent to the findings include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.[26]

Id. The alleged conspiracy in this case was a monopolization of the markets for generic lorazepam and clorazepate and price fixing. Many questions of law and fact concerning these antitrust violations predominate over individual class member factual or legal issues. As the states have indicated, the calculation of individual damages based upon the volume of prescriptions purchased appears to be the only issue specific to each individual class member, and it is unlikely that individual consumers would take on the time and expense of prosecuting the conspiracy. Rather, the attorney generals of the respective states working together as they have done in reaching this settlement on behalf of their consumers and agencies appear best suited to efficiently and effectively prosecute this action. In addition, judicial economy and convenience to the defendants weigh in favor of class certification and against proceeding with

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[26] The Supreme Court has stated, however, that "[c]onfronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, . . . for the proposal is that there be no trial." Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997); see Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998).

thousands of individual actions. For these reasons, the Court will certify the class for settlement purposes.

B. Third Party Payors

On November 15, 2001, the third party payor plaintiffs moved for final approval of the proposed settlements in United Wisconsin and Arkansas Carpenters, and they petitioned the Court for attorneys' fees and costs.[27] In their motions, the plaintiffs specifically seek: (1) final approval of the Settlement Agreements; (2) final approval of the Allocation and Distribution Plans; (3) final approval of petition for attorneys' fees, litigation expenses, and incentive awards; and (4) certification of their respective classes for settlement purposes only.

(1) Final Approval of Settlement Agreements[28]

(a) Arms-Length Negotiations

Settlement negotiations in both cases began in March 2000 and intensified during June and July 2000. Agreements with Mylan were reached in July 2000 after the FTC agreed to settle its disgorgement claim with Mylan for $100 million, which would be allocated for recovery for the Plaintiff States' agency and *parens patriae* claims. Shortly thereafter, the plaintiffs also

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[27] The amounts to be paid by SST under both settlements were subject to a reservation of rights by SST to terminate its obligation under the settlement in the event that third party payors that opt out of the United Wisconsin Class paid at least $11,669,008 in the twenty United Wisconsin states for the drugs in the class period. Under the November 19, 2001 Stipulation and Order, the parties agreed to extend the original deadline for SST to exercise its right to terminate to November 21, 2001. However, the parties reported at the hearing that SST did not exercise that right and were ready to move forward with the settlement. See 11/29/01 Tr. at 60, 98-99, 168.

[28] The legal standards for final approval and for each of the factors discussed below have been discussed at length above and thus will not be reiterated here.

reached settlement agreements with SST. The parties then engaged in an additional six months of negotiations to draft the various aspects of the settlement agreements. With respect to those negotiations, the parties have represented to the Court through filed affidavits and declarations and representations at the fairness hearing that all decisions concerning offers, counter-offers, and acceptance and rejection of settlement offers were made by the respective named plaintiffs through their regularly retained and in-house counsel, in consultation with the respective Third Party Payor Lead Class Counsel. See 11/14/01 Affidavit of Richard W. Cohen ¶¶ 24-31; Declaration of Elizabeth Bartlett ¶¶ 8-10, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 1; Declaration of Carol Nakhuda, Esq. ¶¶ 6-7, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 3; Declaration of Mary Elizabeth Giblin, Esq. ¶ 3, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 4; Declaration of William H. Pitsenberger, Esq. ¶¶ 7-9, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 5; 11/13/01 Affidavit of Joe R. Whatley, Jr. ¶¶ 6-7. Following the recommended structure set forth in the Manual for Complex Litigation (Third), § 20.22 at 26-31 (1995), the Indirect Purchaser Lead Counsel, in consultation with the respective Third Party Payor Lead Class Counsel, communicated settlement offers to, and received settlement offers from, counsel for the defendants and SST. Communications to and from the respective plaintiffs were conducted solely by their Third Party Payor Lead Counsel. See 11/29/01 Tr. at 37-39, 42-43, 59, 62, 64-70, 162-65; see also 11/14/01 Affidavit of Richard W. Cohen ¶¶ 24-31; Declaration of Elizabeth Bartlett ¶¶ 8-10, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 1; Declaration of Carol Nakhuda, Esq. ¶¶ 6-7, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 3; Declaration of Mary Elizabeth Giblin, Esq. ¶ 3, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 4; Declaration of William H. Pitsenberger, Esq. ¶¶

7-9, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 5; Affidavit of Joe R. Whatley, Jr. ¶¶ 6-7.

Two sets of objectors—the objecting Individually Represented Companies ("IRCs")[29] and UnitedHealth Group ("UnitedHealth")—have challenged the fairness of the settlement, claiming "serious conflict of interest issues affecting the proposed settlements." 11/29/01 Tr. at 115, 121. They concede that the structure set up, and process of negotiation followed, by Indirect Purchaser Lead Counsel, the respective Third Party Payor Lead Class Counsel, and the respective in-house counsel for the various named plaintiff class representatives is a "fine structure if it does what it's supposed to do":

> There are two competing groups fundamentally here. On the one hand consumers, as represented by the Attorneys General and the Federal Trade Commission, and on the other hand third-party payors. There is a limited pot of money available. Both want to assert their best claims to that pot of money. . . . Further, in the third-party payor case, Mr. Cohen brought [the United Wisconsin] case on behalf of only certain third-party payors. . . . Nevertheless, there is another . . . group of third-party payors representing the rest of the universe, the Arkansas Carpenters class. Again, in the third-party payor pool of money. As Mr. Persky and Mr. Cohen explained, they erected a structure that at least outwardly suggests that it might solve the problem. Mr. Persky and Mr. Schachter would represent kind of the world—I suppose—consumers and all third-party payors; Mr. Cohen and Mr. McCallister would represent just the United Wisconsin group, and the Whatley firm would represent just the Arkansas Carpenters firm. Your Honor, I have no quibbles with that structure. In fact, it's a fine structure if it does what it's supposed to do. And for perhaps much of the case, it did do what it was supposed

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[29] Six of the original 17 IRCs—Blue Cross and Blue Shield of Illinois, Blue Cross and Blue Shield of New Mexico, Blue Cross and Blue Shield of Texas (collectively Health Care Services Corp.), Blue Cross and Blue Shield of Massachusetts, Blue Cross and Blue Shield of Minnesota, Federated Mutual Insurance Co.—opted out and therefore do not join the objections to the settlement. The Objecting IRCs are thus comprised of Blue Shield of California, Blue Cross and Blue Shield of Florida, Blue Cross and Blue Shield of Michigan, Conseco Companies, Excellus Health Plan, Inc., The Guardian Life Insurance Co., Humana, Inc., Independence Blue Cross, Kaiser Foundation Health Plan, Inc., Mutual of Omaha Insurance Co., Trigon Blue Cross and Blue Shield, and Trustmark Insurance Co. See 11/29/01 Tr. at 84-86, 114.

to do.

11/29/01 Tr. at 125-26. But they ultimately see a conflict "when there are settlement negotiations":

> What would ideally happen . . . is that unconflicted loyal counsel go in and make their case to the defendants. Defendants, here's our case, here's what we're doing, here are our damages, here is the law, here are our claims, here's what we're entitled to. . . . [B]ut it appears form their discovery that third-party payor class counsel didn't do that. They didn't meet with the defendants, they didn't negotiate with the defendants, and that obviously is critical. Mr. Persky representing the world was not in a position to make the case of third-party payors to the defendants and certainly was not in a position to make the case of the Arkansas Carpenters claimants versus the United Wisconsin claimants. Limited pot of money and divergent claims to it.

Id. at 127; see also, e.g., 11/29/01 Tr. at 124 ("Now, class counsel, I think, is suggesting to the Court that by sitting and waiting by the phones for Mr. Persky to communicate settlement offers, that they have fulfilled their role."). In other words, they object because Indirect Purchaser Lead Counsel, rather than the respective Third Party Payor Lead Class Counsel, met with the defendants and SST. This purported conflict tainted the fairness of the settlement, according to these objectors, in that the negotiations yielded insufficient settlement funds, unfair distribution between classes, and unreasonable fee arrangements.

After thoroughly reviewing the affidavits, declarations, and representations of counsel at the fairness hearing, the Court finds the objectors' alleged conflict of interest, while perhaps theoretically plausible, wholly unsubstantiated by the record. It is true that Indirect Purchaser Lead Counsel met with the defendants and SST. But the objectors have ignored all reality by implying that the respective Third Party Payor Lead Class Counsel passively allowed Indirect Purchaser Lead Counsel to negotiate on their behalf. The evidence properly before the Court

paints a starkly different picture. As Third Party Payor Lead Class Counsel for the United Wisconsin plaintiffs described it:

> The procedure under which we worked, as Mr. Persky referred to, worked beautifully, and it worked just as contemplated under the manual for complex litigation 3d, Section 28.221 and 222, which contemplates that in cases, centralized cases involving multiple parties and multiple classes with possibly divergent interests, that the Court appoint what's called a designated counsel, which can be further refined to liaison, lead, et cetera. It also contemplates that the designated counsel may be in the best position to, because of its day-to-day contact with the defendants, to actually receive a settlement offer, provided that it understand from the outset a clearly delineated limitation on its authority, and that's what occurred here. Mind you, there were points during the litigation, not simply at the settlement phase, where we did, in a sense, override the liaison counsel. For instance, at one point the defendants propounded discovery concerning, I think it was 21 different drugs, which was not a matter that greatly affected the consumer cases that Mr. Persky and Mr. Schachter were involved in, but did affect the third-party payor classes because it was a considerable amount of discovery being sought on a case that was concerned with two drugs, Lorazepam and Clorazepate. And in that instance I dealt directly with Mr. Miller at Clifford, Chance, Rogers & Wells to refine that discovery request to a manageable one for the thirty-party payors. In our brief and in our affidavits we described how the settlement process in this case worked, which was that Mr. Persky and Mr. Schachter received settlement offers from the defendant—from Mylan, and this occurred after the State AGs and the FTC had settled, which were communicated to me. I then communicated them to Mr. McCallister, who personally represents Kansas Blue Cross, to Ms. Bartlett, who was the in-house counsel at United Wisconsin, and to Ms. Giblin, who was in-house counsel at Care First. I would then confer with them. We would accept, reject, have counteroffers, et cetera. We would communicate that back to Mr. Persky or Mr. Schachter. By the way, not once throughout this case had any lawyers from either the Zwerling or Goodkind firms even met the in-house counsel, the class representatives. We kept the—we kept the wall—we kept the integrity of the wall throughout this case. However, we did engage in a coordinated prosecution of this case with the plaintiffs in the Arkansas Carpenters case and with the group represented by Mr. Schachter and Mr. Persky with those 13 state cases in the interest of judicial economy, efficiency and in the interest of our personal economy and efficiency, and it worked very well.

11/29/01 Tr. at 66-68. Counsel elaborated:

> Given [the financial health of Mylan] and given what we had already discussed

with our expert and the IMS data that we had already reviewed, we came up with a reasonable range of settlement for the United Wisconsin case, which was the only case that my clients and I and Mr. McCallister were concerned with. We didn't give that number to Mr. Persky or Mr. Schachter, but we told them if they received any offers concerning our case, that they were to communicate to me, and I glued myself to my chair for the 6th and the 7th of July and also during the 28th and 29th of June, and I instructed the in-house counsel that my clients do the same. And we had many, many hours of back and forth during the course of those days. Now, the objectors complain that I wasn't in the room. Two things. One, we did this the way the manual contemplates. And 2, I wasn't in the room for strategic reasons. We purposely set up this mechanism because it's my experience from 18 years on the defense side and now four years on the plaintiffs' side in class action litigation, that the enemy of settlement is to have a myriad of different plaintiff groups represented by different multiple attorneys sitting around a room and heckling the defendant who wants to know who can I deal with and who can I settle this with and who can I communicate with without having to hear everybody's parochial concerns on every matter. And, in fact, early in the case, Mr. Miller at Rogers-Wells and his partner Mr. Weidner communicated to me that that was the procedure by which they would appreciate any settlement discussions to occur, that they would communicate an offer to Persky and Schachter. Everybody understood that the authority rested with me, with Mr. McCallister and more importantly with our clients who were not your typical class action plaintiffs, who have a nominal interest and perhaps don't even follow the case. The affidavits of Mr. Schachter, Ms. Bartlett Mr. Pitsenberger, who is the in-house counsel at Kansas Blue Cross, Ms. Giblin, myself, all attest to the arm's-length nature of the United Wisconsin settlement. We speak here only for the United Wisconsin settlement. We have no doubts concerning the others, but they're outside my bailiwick.

Id. at 71-72; see also id. at 162-63 ("In terms of procedure, again, Mr. Cohen has described it, and the same procedure applied to [the Arkansas Carpenters case].").[30] The Court can find no

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[30] See also 11/29/01 Tr. at 157-58 ("The memorandum that went among our counsel before those negotiations occurred was strictly among the United Wisconsin, Kansas, and Care First counsel, Mr. McCallister and myself. We had our own strategy. We sent—Mr. Persky and Mr. Schachter went to those negotiations without our number. They were authorized to convey to us numbers that were presented by Mylan. They did so. We took them up. We kept coming back and saying not enough, not enough. When they go near our number, we still told them not enough. We told them when they were getting warm, and when they hit our number we agreed. And that's how it wen, and that's in evidence. That's not Mr. Garber's speculation."); id. at 156-57 ("[A]ll decisions concerning offers, counter-offers, acceptance, rejections in the United Wisconsin case were made by Mr. McCallister, me and the in-house counsel at Wisconsin

fault with this structure and process used by counsel throughout the negotiation process, as counsel for the respective plaintiffs were actively involved and made the key decisions respecting offers, counter-offers, and the acceptance and rejection thereof. See 11/14/01 Affidavit of Richard W. Cohen ¶¶ 24-31; Declaration of Elizabeth Bartlett ¶¶ 8-10, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 1; Declaration of Carol Nakhuda, Esq. ¶¶ 6-7, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 3; Declaration of Mary Elizabeth Giblin, Esq. ¶ 3, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 4; Declaration of William H. Pitsenberger, Esq. ¶¶ 7-9, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 5; Affidavit of Joe R. Whatley, Jr. ¶¶ 6-7. Ultimately, therefore, the Court finds that both settlements were the products of arm's length negotiations by experienced counsel, undertaken in good faith and after substantial factual investigation and legal analysis.[31]

Kansas and Care First Blue Cross, and that's all of our affidavits and that's in evidence and that's not speculation.").

[31] The Court is mystified by the objectors' desire to mediate a way out of the purported conflict. As Mr. Garber articulated the objectors' position:

> And I'll submit, Your Honor, that if that happens, there can be a resolution. What I'm not doing here today, Judge, is arguing that the case should be blown up, that we should start back at ground zero. What I'm arguing is that there is a solution. . . . What I am recommending to the Court is, even before the Court passes on the fairness of the settlement, because I don't want this case to fall apart, that the Court consider directing the parties, including the objectors, to engage in mediation, to do it on a short time schedule, to do it under Court supervision, and to see if we can arrive at a resolution.

11/29/01 Tr. at 132-33. As stated from the bench at the hearing, however, the Court fails to see how mediation—as a means of merely tinkering with the fund allocation and fees—could purge the taint of a true conflict of interest. Rather, if a true conflict existed, it seems to the Court that the entire settlement would be have to be vacated, new counsel would be necessitated, and the case would then proceed to trial or be settled through new agreements.

(b) Terms of Settlement in Relation to Strength of Plaintiffs' Case

Under the Stipulation of Settlement in United Wisconsin, Mylan agrees to pay $25 million, and SST agrees to pay $285,600, into interest-bearing escrow accounts to be distributed after final approval of the settlement. See United Wisconsin Settlement Agreement §§ I.MM, III.A.[32] Under the accompanying Allocation and Distribution Plan, the total amount less attorneys' fees and expenses, costs of administration of the settlement, and incentive awards to the plaintiffs ("Net Settlement Amount") will be distributed to members of the United Wisconsin Class that file timely claims. See United Wisconsin Allocation and Distribution Plan at 3-4. There are two claim options. Under the first, third party payors that maintained records of the actual amounts paid or reimbursed for the drugs for persons residing in the United Wisconsin jurisdictions, and can certify the accuracy of that information, will have their claims recognized at 100% of such amounts. Under the second claim option, third party payors whose records enable them to certify only the amounts paid or reimbursed for the drugs for persons residing throughout the United States can estimate the amounts paid or reimbursed for the drugs for persons in the United Wisconsin jurisdictions by multiplying the ratio of their "covered lives"[33] in

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[32] Class counsel reported at the fairness hearing that interest on the escrowed settlement fund is nearly $500,000, yielding a gross settlement fund of approximately $25,775,000. The administrative expenses total approximately $250,000, with $110,000 spent on notice costs and $140,000 on settlement administration. After the requested fees, expenses, and incentive awards sought, over $21.5 million net will be available for distribution to the class members. See 11/29/01 Tr. at 60-61.

[33] "Covered Lives" means either the number of: (a) persons covered by a United Wisconsin Class member's prescription drug benefit plans as of January 1, 1999; or (b) the aggregate months of coverage for all persons covered during the Class Period by a United Wisconsin Class member's prescription drug benefit plans. United Wisconsin Allocation and Distribution Plan at 4 n.1.

the United Wisconsin jurisdictions to their covered lives in the United States by the nationwide amount. Those claimants will have their claims recognized at 80% of such estimated amounts. Class members that file timely and valid claims will receive a distribution based on their distribution ratio, which will be determined by dividing the individual claim by all claims. The distribution will be calculated by multiplying the ratio by the Net Settlement Amount. See id. at 4.[34]

In Arkansas Carpenters, Mylan agrees to pay $10 million, and SST agrees to pay $114,400. See Arkansas Carpenters Settlement Agreement §§ I.LL, III.A.[35] The Allocation and Distribution Plan is essentially identical to the United Wisconsin plan. As in that plan, the total amount less attorneys' fees and expenses, costs of administration of the settlement, and incentive awards to the plaintiffs ("Net Settlement Amount") will be distributed to members of the Arkansas Carpenters Class that file timely claims. See Arkansas Carpenters Allocation and Distribution Plan at 3-4. The same two claim options also exist, and class members that file timely and valid claims will receive a distribution based on their distribution ratio multiplied by the Net Settlement Amount. See id. at 4.

The plaintiffs correctly note that these settlements ensure recovery of an all cash amount for third party payors, which must be balanced against the continued expense and risks of the lengthy and complex antitrust litigation, especially in this case in which an alleged vertical conspiracy is at issue with Profarmaco and Mylan, for example, at different levels of distribution.

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[34] At the fairness hearing, class counsel estimated an average distribution of $10,000 per claimant. 11/29/01 Tr. at 61.

[35] SST's total amount in these cases, $400,000, is a portion of the $2 million that it is paying as part of its global settlement. See supra note 11 and accompanying text.

Any prospective award from a jury, of course, presupposes survival of motions to dismiss, motions for summary judgment, and successful certification of one or more classes in all of the respective jurisdictions. Even assuming the plaintiffs could surpass such significant hurdles, post-trial motions and appeals would be likely, which would delay and further risk recovery. See 11/29/01 Tr. at 73-76. As this Court has previously stated:

> By reaching a large settlement at a relatively early stage in the litigation, plaintiffs avoided significant expense and delay and ensured a guaranteed recovery at a high level. Antitrust price fixing actions are generally complex, expensive, and lengthy. Trial of this matter easily could have lasted months and may not even have started for many years; and any verdict inevitably would have led to an appeal and might well have resulted in appeals by both sides and a possible remand for retrial, thereby further delaying final resolution of this case. These factors weigh in favor of the proposed Settlement.

In re: Vitamins Antitrust Litig., 2000-1 Trade Cas. (CCH) ¶72,862, 2000 WL 1737867, *4 (D.D.C. Mar. 31, 2000) (citing Slomovics v. All for a Dollar, Inc., 906 F. Supp. 146, 149 (E.D.N.Y. 1995) ("The potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interest of the Class.").

The plaintiffs highlight the fact that they are indirect purchasers as one of the most significant legal impediments to the successful prosecution of their lawsuit. See Illinois Brick Co. v. Illinois, 431 U.S. 720, 728-29 (1977) (holding that only direct purchasers have standing to assert antitrust injury for the purposes of section 4 of the Clayton Act); In re Lorazepam & Clorazepate Antitrust Litig., 202 F.R.D. 12, 17-19 (D.D.C. 2001). They further cite substantive defenses that have been asserted by the defendants such as the defendants' denial that they proximately caused the alleged antitrust injury and damages when prices were passed down through many levels of distribution, Mylan's denial that it cornered the market as its competitors

obtained API from an alternative supplier, and Mylan's challenge to the relevant product market definition. The plaintiffs also acknowledge the significant difficulties involved in contested state-by-state or multi-state class certification proceedings. See 11/29/01 Tr. at 76-79. Finally, the plaintiffs justify the lesser recovery for the Arkansas Carpenters Class on the basis that the Arkansas Carpenters jurisdictions do not have state antitrust or consumer protection laws that permit indirect purchaser claims for antitrust violations, thus leaving them with only unjust enrichment claims in relatively unchartered territory. See 11/29/01 Tr. at 109-10. When compared to such risks and costs of continued litigation, the plaintiffs contend, the terms of the settlements are fair, reasonable, and adequate.

The IRCs, UnitedHealth, and Health Net, Inc. ("Health Net") filed several sets of objections to the terms of the settlement.[36] The IRCs and UnitedHealth first complain that the settlements generally short-change third party payors, and all three objectors argue that the settlement amounts are unfairly disproportionate to the settlement amounts for other victims. For a benchmark against which to measure the reasonableness of the settlements, the objectors look to a $388 million figure, referenced in the United Wisconsin Settlement Agreement, that represents the amount third party payors paid for both drugs during the relevant two-year time period. They also point to the allegation that Mylan raised prices by 1200% to 4000% and argue that even using the low-end 1200% figure, the overpayment was at least $355 million. The settlements' total of $35 million, contend the objectors, appears to be a mere 9.8% of the damages suffered by third party payors and is thus inadequate. All the objectors additionally

[36] The objectors' arguments concerning attorneys' fees are addressed below. See supra pp. 57-59.

argue that this amount is inadequate because it is smaller than the $71 million recovered by the Plaintiff States in the settlement on behalf of consumers.

After carefully reviewing the plaintiffs' expert report, the relevant filed affidavits in evidence, and the representations made by counsel at the hearing, see Redacted Report of John Pisarkiewicz, Ph. D., 11/14/01 Affidavit of Bernard Persky, Exs. 4-5; 11/14/01 Affidavit of Richard W. Cohen ¶ 21; 11/29/01 Tr. at 70-71, 73, 101-04, the Court finds no merit in this objection. Although fully litigating the claims through trial could possibly result in a higher recovery, the settlement represents a necessary compromise between inherent risks of doing so and a guaranteed cash recovery. The Court is convinced that the $355 million to $388 million benchmark used by the objectors is inflated and unrealistic. The $388 million figure is the parties' agreed upon estimate of the retail dollar amount of all payments and reimbursements made by the third party payors for all manufacturers' versions of generic lorazepam and clorazepate for the entire class period for persons residing in the United Wisconsin jurisdictions. It does not, therefore, reflect the alleged damages; assuming otherwise would equate damages with 100% of retail purchases. Moreover, that figure represents the retail sales of all manufacturers, not just Mylan, and this Court has rejected the umbrella damages theory. FTC v. Mylan Labs., 62 F. Supp. 2d 25, 38-39, 43 (D.D.C. 1999).[37] Class counsel thus reasonably relied on other, more accurate numbers, in consultation with their retained expert. See, e.g., 11/14/01 Affidavit of Richard W. Cohen ¶¶ 21 ("Between August 1999 and June 2000, I met with and spoke on several occasions with plaintiffs' consulting economist, John Pisarkiewicz, Ph.D, to

[37] During the relevant time period, Mylan only had approximately 45% of the market for lorazepam and 73% of the market for clorazepate. See Redacted Report of John Pisarkiewicz, Ph. D. ¶ 35, 11/14/01 Affidavit of Bernard Persky, Ex. 4.

investigate ranges of damages potentially attainable by United Wisconsin Action class members."). They reviewed Mylan's Annual Report on SEC Form 10-K for the fiscal year ending March 31, 2000 in preparation for settlement negotiations, which reflected significantly decreased sales between 1999 and 2000 resulting in a total sales figure of approximately $255 million during the relevant class period. Mylan's Audited Consolidated Balance Sheet showed that Mylan had aggregate cash and equivalents of approximately $203 million as of March 31, 2000, and Mylan's stock price was at a three-year low. Shortly before it settled with these plaintiffs, Mylan also had entered into a settlement agreement with the FTC and Plaintiff States for $100 million plus $8 million in fees, which significantly diminished the available cash. Mylan contemporancously had significant exposure to potential liability from the related actions:

> Now we're talking about a relatively small, by pharmaceutical company standards, generic pharmaceutical company that's left with $100 million in cash in total still facing the United Wisconsin action, still facing the Arkansas Carpenters action, still facing the direct purchaser action, which has many of those same prosecution advantages that I stated earl[ier] regarding the State A.G.s and the Federal Trade [C]ommission, a single unitary claim under Section 4 of the Clayton Act.

11/29/01 Tr. at 89-90. The amounts recovered through these settlements represents between approximately fifteen to thirty percent of the plaintiffs' expert's estimated damages.[38] Given the reality of Mylan's financial condition in July 2000, and the significant hurdles to litigating the case to a successful and sustainable verdict, the Court finds the settlement amounts to be

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[38] Under Dr. Pisarkiewicz's analyses, the estimated retail damages caused by Mylan in the United Wisconsin jurisdictions are $128.9 million, and the estimated disgorgement damages are $80.7 million. See Redacted Report of John Pisarkiewicz, Ph. D. ¶¶ 12, 14, 32, 39, 11/14/01 Affidavit of Bernard Persky, Ex. 4. His estimated disgorgement damages in the Arkansas Carpenters jurisdictions are $68.6 million. See Redacted Report of John Pisarkiewicz, Ph. D. ¶¶ 8, 26, 11/14/01 Affidavit of Bernard Persky, Ex. 5.

reasonable under the circumstances.[39]

In addition, the Court agrees with the plaintiffs' position that comparing these settlements to the FTC and Plaintiff States' settlement is pointless because the FTC already had a disgorgement ruling in its favor before it settled, it was a single litigant with a nationwide claim with no procedural impediment to aggregation such as class certification, all fifty states are involved in that settlement, the State Attorneys General could similarly aggregate their claims under *parens patriae* authority, and they had significant direct purchaser claims under Section 4 of the Clayton Act. The relative plaintiffs had significantly different variables to consider in

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[39] This conclusion is bolstered by the fact that even the objectors took inconsistent positions with one another on various aspects of the settlements. Despite the fact that they intended to provide a "joint presentation" on their objections at the fairness hearing, 11/29/01 Tr. at 114, counsel for UnitedHealth stated that it "was a very good, substantial result to get the defendants in this case to agree to discharge the amount of money they did," id. at 131, and proceeded to opine that the settlement funds only needed to be allocated differently. By stark contrast, counsel for the objecting IRCs proclaimed "that this is not a terrific settlement for third-party payors, it's a terrible settlement for third-party payors" and prayed for disapproval as the settlement funds were woefully inapt. Id. at 148. As class counsel succinctly responded, "So much for their coordinated presentation." Id. at 155. And despite counsel's opinion on the "terribleness" of the settlements, several of his clients nonetheless opted in. All parties agree that the third party payors, including the IRCs, are sophisticated entities with a significant financial stake in this case. See, e.g., 11/29/01 Tr. at 90-91 ("MR. COHEN: . . . Here we have a class of sophisticated, well-heeled third-party payors with substantial financial stakes."); id. at 118 ("MR. RHOAD: . . . Moreover, our clients are all sophisticated companies, as Mr. Cohen mentioned. They operate in a highly competitive market and they are very much concerned about their business operations."). The fact that many of the IRCs themselves decided to opt-into the settlements therefore lends little credibility to counsel's position on their "terribleness." As the Seventh Circuit recently stated in a similar situation, "Unlike members of the consumer class, [third party payors] are sophisticated purchasers of pharmaceuticals. Their consent to this deal shows that a larger judgment was unlikely." In re Synthroid Marketing Litig., 264 F.3d 712, 717 (7th Cir. 2001) (Easterbrook, J.). Such inconsistencies among objectors illustrate the complexities inherent in class action settlement efforts and highlight the reasonableness of the compromise embodied in the settlements reached here.

contemplating settlement.[40]

Second, the IRCs, UnitedHealth, and Health Net provide a set of objections concerning the differences between the United Wisconsin and Arkansas Carpenters settlements. UnitedHealth and Health Net object to the unequal amounts allocated to each respective settlement class. This objection, however, ignores Illinois Brick and this Court's prior rulings

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[40] In this regard, counsel for the objecting IRCs made several representations to the Court at the fairness hearing that—at a minimum—lack credibility:

> MR. SIMMER: . . . Now, Mr. Cohen spoke about a pragmatic settlement. The problem with that, Your Honor—and he gave us a parade of horrors about how difficult this case would have been. The problem with that, of course, Your Honor, is that this same parade of horrors is the same horrors that the States and the FTC face in large part in prosecuting their case. They would have faced almost identical defenses in many respects with regard to definition of the relevant market and proof problems, as well.
>
> THE COURT: FTC has the same problem with standing and being the proper plaintiff to bring the case?
>
> MR. SIMMER: I'll concede on that point, Your Honor. FTC did not have a standing issue, but you may remember, as originally filed, the FTC's complaint was on behalf of all injured parties, including corporate injured parties; that the fact that that portion of the settlement got left on the settlement room floor really speaks volumes about the problems with the settlement, we would submit.
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> ***
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> MR. GENTILE: And the fact that the FTC—In fact, we called the FTC, Your Honor, to tell them what was happening here. We've been informed by officials of the FTC, and I've been authorized to say to you, that their position is that they have never represented corporate parties, that the disgorgement that they sought under the FTC Act was meant to either pay consumers, which they are doing through the use of the Attorneys General as a mechanism to do that. The other alternative with that money was to turn it over to the Federal Treasury. They declined to do that.

11/29/01 Tr. 136-37, 150-51.

that indirect purchaser damages claims would be recognized only under the laws of states with express rights of action for indirect purchasers. FTC v. Mylan Labs., 62 F. Supp. 2d at 43. The respective amounts reflect such rulings in that they account for the weaker claims of the Arkansas Carpenters class members in states without Illinois Brick repealers and in which they would relying solely on common law unjust enrichment claims.

In a similar vein, the IRCs object that the United Wisconsin settlement improperly excludes Nebraska claims because the state recognizes indirect purchaser claims.[41] This objection, too, lacks merit. A plaintiff is master of its claim, which is equally true of a class plaintiff. Class counsel has averred that none of the United Wisconsin plaintiffs conducts meaningful business in Nebraska, and Nebraska law claims were not included in any complaint they filed. If the objecting IRCs believed they had a meritorious Nebraska claim, they had the option to prosecute it. Their failure to do so does not render this settlement unfair or unreasonable.

The IRCs, UnitedHealth, and Health Net also claim that the determination of class membership in the respective classes by state of residence of beneficiaries is inaccurate, arbitrary, and burdensome. They claim that it is inaccurate because few third party payors track place of

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[41] For support, the objectors cite the Nebraska Consumer Protection Act, Neb. Rev. Stat. §§ 59-1601(2) ("Trade and commerce shall mean the sale of assets or services and any commerce directly or indirectly affecting the people of the State of Nebraska."); 59-1602 ("Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce shall be unlawful."); 59-1603 ("Any contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce shall be unlawful."); and 59-1609 ("Any person who is injured in his business or property by a violation of sections 59-1602 to 59-1606, or any person so injured because he refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of sections 59-1603 to 59-1606, may bring a civil action in the district court to enjoin further violations, to recover the actual damages sustained by him . . . .").

residence for all of those covered by their plans (e.g., child away from college), and in the IRCs' and UnitedHealth's view, the dichotomy is arbitrary and burdensome because participation in the settlement is not tied to the place where prescriptions are filled, as many dependants cross state lines when filling prescriptions. A better approach, they claim, would tie participation in the classes to the location of the pharmacy where prescriptions are filled because third party payors regularly track such information. They ultimately believe that parity should exist between the jurisdictions. Health Net similarly contends that there is no support for the currently devised two-class dichotomy in this case. But in stark contrast to the pharmacy and parity approach proposed by the other objectors, it believes that states like California, where "abundant case law makes clear that indirect purchasers may recover treble damages" and attorneys' fees, should receive a greater share of any recovery. Health Net Mem. at 4-5.

The Court finds that the plaintiffs' choice to base class eligibility upon the class members' plan members' states of residence fair and reasonable because it generally comports with the purposes of the states' antitrust laws. The IRC's and UnitedHealth's proposed alternative of pharmacy location, as pointed out by class counsel, is not necessarily better because most individuals purchase their pharmaceuticals in their state of residence, and even where that is not the case, basing class eligibility on pharmacy location would result in anomalous situations in which a Maryland resident, for example, could benefit from the District's Illinois Brick repealer, even though the Maryland legislature has chosen not to afford its residents such protections. Moreover, a substantial percentage of prescriptions are filled by mail order pharmacies, one of the largest of which is located in Ohio, which is a non-United Wisconsin jurisdiction. Despite the encouragement to third party payors' members to use mail order prescriptions, the pharmacy-

location approach would deny third party payors the benefit of recovery when their members used this feature. While the respective settlement amounts may not be perfect for all affected third party payors, it represents a reasonable compromise, which is perhaps best illustrated by the fact that even the objectors disagree with one another on this issue: the objecting IRCs and UnitedHealth would divide the funds equally between the classes, while the other objector, Health Net, would direct greater amounts of money toward states like California.

Third, the IRCs and UnitedHealth have lodged objections against the claim process. They contend that the two options for calculating payments for the purpose of submitting claims effectively exclude indemnity payments, in which the payor pays the pharmacist and is subsequently reimbursed upon submission of the claim to the insurance company. Normally, they point out, indemnity payors do not have a claim record detailing reimbursement for specific drugs and thus will be unable to provide the necessary claims information. Yet, here, indemnity payors would have to provide evidence of the claimed payment. They estimate that up to ten percent of third party payor claims are such indemnity payors. See 11/29/01 Tr. at 138-40. Such payors did not opt-out, the objectors explain, because they "found themselves in [a] catch-22":

> MR. SIMMER: . . . To file a claim in this settlement, you had to have a specific claim record of your payments for these two drugs. Indemnity payors don't have that, so they couldn't make a claim. Okay. One might ask, why didn't they opt out? Mr. Cohen has explained, to opt out of this settlement, you also had to provide data about your payments for these two drugs.

Id. at 139-40.

But the Court finds this objection misplaced and counsel's representation with respect to it rather disturbing. The Court agrees with the plaintiffs that the objectors would fare no better proceeding to trial, as they would have to demonstrate damages, and it would be unfair to permit

this ten percent of the population to block the settlement for the other ninety percent when the ten percent simply could have opted out. What is appalling to the Court in relation to this objection is that in making the IRCs' case, counsel appears to have grossly misrepresented facts to the Court, as pointed out by class counsel:

> MR. COHEN: . . . I have to go further than that, however, because Mr. Simmer, when asked why they didn't opt out, told the Court an absolute lie. He said that we didn't opt out because we had to provide—in order to opt out, we had to provide our claims information. He knows full well that is not true, that the class information was requested, not required. That was clarified in a letter prior to the deadline date. And, in fact, Mr. Simmer's firm did opt out for clients and provided no claims information. They knew full well that was not required.

Id. at 154. Needless to say, the Court finds no credibility in the objectors' counsel's arguments on the purported "catch 22."[42] The information for opt-outs in the United Wisconsin settlement was

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[42] At the hearing, in fact, the Court had to ask counsel repeatedly for a clarification of the objections' reasons for not opting out. The Court finds the responses of IRCs' counsel ambiguous and disgenuine, if not totally incredible. Counsel began by volunteering:

> MR. RHOAD: . . . Why we didn't opt out. That was the question posed by Mr. Cohen here today suggesting that our clients spoke with their feet, I guess is the term that he used, by remaining in the class. Well, the answer to that question—it's a very good question as a preliminary matter, but he answer is two-fold, Your Honor. And I believe that you will find that both answers or both parts of the answer are compelling. While opting out may very well have been the easiest route for our client to take to demonstrate their dissent in this case, our clients have elected instead to taken a stand. They're concerned that if attempts are not made to correct the substantial problems they have identified with these proposed settlements, that there is the very real and significant risk that these same problems will affect settlement proposed in future cases of a similar nature. . . . The second concern of our clients, which compelled their election to remain in the class and submit objections rather than opt out, is their recognition that the settlement funds established in this case of consumers and third-party payors . . . is their recognition that the settlement fund established in this case for consumers and third-party payors is not insubstantial . . . the problem here isn't necessarily the amount of the settlement fund, but rather the way the settlement fund has bee allocated among the parties . . . .

requested, not required, and the plaintiffs made the request because that settlement, and not the Arkansas Carpenters settlement, was subject to a reduction provision if opt-outs exceeded a certain threshold and an SST termination provision if the opt-outs exceeded another threshold figure. The requested information was used solely to determine whether those thresholds were met. See 11/29/01 Tr. at 97-99. Requesting such information was reasonable.

Finally, UnitedHealth objects to the releases, citing a parade of horribles including potential violations of ERISA if third party payers who have no authority to do so release claims of beneficiaries. But the Court is satisfied with class counsel's explanation of the agreements' savings clause; it does not release the claims of beneficiaries and affiliates "to the extent that any such Person's claim is independent of such Person's relationship to Plaintiffs or Settlement Class Members." Settlement Agreement ¶ I.KK; see also 11/29/01 Tr. at 99.

For all of the reasons discussed above, the Court finds that the terms of the settlements, when compared to the strength of the plaintiffs' cases, are fair, adequate, and reasonable, and this factor accordingly favors final approval.

11/29/01 Tr. at 119-21; see also id. at 149 ("MR. SIMMER: . . . "[A]s Mr. Rhoad explained earlier, what we're trying to do is take a stand here."). Far from "compelling," however, the Court finds the first, what the Court will deem "class action martyr" reason, unbelievable. Rather than having counsel write an op-ed in the *Wall Street Journal*, *New York Times*, or *Washington Post*, counsel incredibly asks the Court to believe that their clients wanted to remain part of a settlement that in their view was "terrible", while their colleagues opted-out, to set a better precedent for class actions generally, despite counsel's statement that they "are all sophisticated companies . . . [and] operate in a highly competitive market and they are very much concerned about their business operations." 11/29/01 Tr. at 118. The second reason therefore is much more credible, albeit entirely unhelpful to the objectors in that it bolsters the reasonableness of the settlement funds. See supra note 39. As perhaps best articulated by class counsel, "We heard quite a bit from the objectors as to why they didn't opt out. And I'll suggest that they never gave you the honest answer. They don't want to walk away from $25 million in [the United Wisconsin] case. That's why they didn't walk out." 11/29/01 Tr. at 154.

(c) Status of Litigation at Time of Settlement

The plaintiffs had sufficient information at the time they entered these settlement agreements. As discussed in significant detail above, class counsel conducted an extensive investigation from May 1999 to July 2000 relating to the claims and underlying events and transactions alleged in the complaints. During coordinated discovery, they reviewed hundreds of thousands of pages of party and non-party documents were reviewed, and in excess of seventy party and non-party depositions had been taken. They also consulted with experienced economics experts and ultimately retained John Pisarkiewicz, Ph.D. in August 1999, whose reports have been filed with the Court, to advise them on matters of class injury and damages.

(d) Reaction of Class

Pursuant to the Court's preliminary approval order, over 13,000 copies of the Notice of Settlement of Class Actions, Proof of Claim, and Notice of Exclusion were mailed directly to class members in both actions. Out of large and sophisticated classes in each action, three sets of objections have been filed on behalf of a total of thirteen objectors. Only a handful of managed care companies and a small number of self-funded third party payor plans, totaling fourteen third party payors, have opted out of United Wisconsin. Similarly, only seventeen have opted out of Arkansas Carpenters. See, e.g., 11/14/01 Affidavit of Bernard Persky ¶ 94.[43] The fact that such an overwhelming majority of class members elected to stay in the class evidences a favorable reaction by the class to the settlement. And although several objections were filed by a relatively

[43] A Schedule of Opt-Outs for each case is attached as Exhibit 1 to the respective orders and final judgments, which accompany this Memorandum Opinion.

few members of the class, for the reasons discussed at length above they ultimately present no obstacle to final approval. Accordingly, this factor supports final approval of the settlements.

(e) Opinion of Experienced Counsel

Class counsel has substantial experience in litigating and resolving complex cases, including pharmaceutical overcharge antitrust matters on behalf of classes of sophisticated third party payors. See, e.g., 11/14/01 Affidavit of Richard W. Cohen ¶ 4. Given the arms-length negotiations conducted by counsel, counsel's consultation with the plaintiffs' retained expert, and their extensive discovery and investigation, the Court will credit counsel's opinion that these settlements are fair, reasonable, and adequate.

(2) Final Approval of the Allocation and Distribution Plan

For the specific reasons discussed at length above respecting the Allocation and Distribution Plan in each case, see supra pp. 43-55, the Court finds the plans fair and reasonable and will approve them.

(3) Final Approval of Attorneys' Fees and Costs

In United Wisconsin, Third Party Payor Lead Class Counsel specifically seek approval of the following: (1) a fifteen percent attorneys' fee; (2) reimbursement of out-of-pocket litigation costs and expenses in the amount of $278,267.33; and (3) payment of an incentive award of $25,000 for each of the named plaintiffs. In Arkansas Carpenters, Third Party Payor Lead Class Counsel similarly seek: (1) a 22.5% fee; (2) reimbursement of $110,000 in costs; and (3) payment of an incentive award of $10,000 to each of the named plaintiffs in the Middle Tennessee and Cement Masons actions.

The IRCs and UnitedHealth object to the fee petitions. Pooling together the fees sought here by United Wisconsin Third Party Payor Lead Class Counsel, the fees sought by Arkansas Carpenters Third Party Payor Lead Class Counsel, and the $4 million sought by Indirect Purchaser Lead Counsel for the benefit of approximately forty-one firms representing the State Purchaser Plaintiffs, they contend that the $10 million in attorneys' fees is excessive when juxtaposed to the total recovery of $35 million. They allege that the respective Third Party Payor Lead Class Counsel did not earn the requested awards because they merely piggy-backed on the FTC's and Plaintiff States' work.

The Court disagrees. Under the legal standard and relevant factors detailed at length above, see supra pp. 24-26, the Court finds the attorneys' fees and costs petition in both cases fair and reasonable and will accordingly approve them. First, the objectors have erroneously conflated the relevant figures. Despite the fact that Indirect Purchaser Lead Counsel will receive a portion of the fees requested here, the $4 million fee that Mylan has agreed to pay them in connection with the settlement of the FTC's and Plaintiff States' action and dismissal of the State Purchaser Actions was separately negotiated and is wholly independent of the fees requested in these cases. It should be evaluated accordingly, as the Court has done. See supra pp. 28-30. Similarly, the fees sought here are independent of one another, as United Wisconsin Third Party Payor Lead Class Counsel and Arkansas Carpenters Third Party Payor Lead Class Counsel have litigated, negotiated, and settled their respective cases in an independent, albeit coordinated, fashion.

Second, counsel in both cases correctly note that the fifteen percent contingency fee sought in the United Wisconsin case and the 22.5% sought in the Arkansas Carpenters action are

at the low end of the acceptable range of fee awards in common fund cases.[44] As noted above, while fee awards in common fund cases range from fifteen to forty-five percent, the normal range of fee recovery in antitrust suits is twenty to thirty percent of the common fund. See Swedish Hosp. Corp., 1 F.3d at 1271-72; see also In re Aetna Inc., MDL No. 1219, 2001 WL 20928 (E.D. Pa. Jan. 4, 2001) (finding thirty percent to constitute a reasonable award); In re Ampicillin Antitrust Litig., 526 F. Supp. 494, 498 (D.D.C. 1981) (noting that while the bulk of fee awards in antitrust cases are less than twenty-five percent, several courts have awarded more than forty percent of the settlement fund). Contrary to the objectors' conclusory speculation about counsel's efforts, this has been a lengthy and complex antitrust case, involving multiple jurisdictions, extensive investigation and discovery, coordination, and negotiations. Counsel in these cases are experienced antitrust litigators, and they have detailed their efforts in these cases in affidavits filed with the Court. See 11/14/01 Affidavit of Richard W. Cohen; 11/13/01 Affidavit of Joe R. Whatley, Jr.; 11/14/01 Affidavit of Bernard Persky; 11/13/01 Affidavit of Robert S. Schachter. As a result of their efforts, the United Wisconsin class members, numbering in the thousands, are expected to recover thousands of dollars each from a total fund of $25,285,600, and the estimated 13,000 Arkansas Carpenters class members will recover a total of $10,114,400.

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[44] Counsel in United Wisconsin negotiated 15% fee retainer agreements with the class plaintiffs at the outset of the case, and through a candid statement at the fairness hearing revealed the modest nature of the fees involved here:

> I can assure you that if I knew then what I now, I never would have agreed to the 15 percent standing here two and half years later. It's the lowest fee we've ever agreed to in one of these cases, and in our subsequent fee agreements we've refused to accept that given the complexities involved in these cases and the length of time it takes to collect.

11/29/01 Tr. at 105.

With respect to costs, counsel in United Wisconsin seek reimbursement of out-of-pocket expenses totaling $278,267.33, and counsel in Arkansas Carpenters seek $110,000. In addition, the plaintiffs seek incentive payments of $25,000 to each of the three class representatives in the United Wisconsin case and $10,000 each to the three named plaintiffs in Arkansas Carpenters, Middle Tennessee, and Cement Masons.[45] The allocation for the out-of-pocket expenses is detailed in counsel's affidavits and has not been disputed, see, e.g., 11/13/01 Affidavit of Robert S. Schachter ¶ 8, and the Court finds the respective claimed expenses reasonable. The Court also finds the incentive awards to be reasonable under the circumstances. "Incentive awards are 'not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.' . . . In fact, '[c]ourts routinely approve incentive awards to compensate named plaintiffs for the services they provided and the risks they incurred during the course of the class action litigation.' " Cullen v. Whitman Med. Corp., 197 F.R.D. 136 (E.D. Pa. 2000) (quoting In re So. Ohio Correctional Facility, 175 F.R.D. 270, 272 (S.D. Ohio 1997)). Counsel has sufficiently explained that the named plaintiffs in both cases provided in-house counsel, fraud investigators, and pharmacy benefits managers to aid in the prosecution of this case, whose efforts included investigating, negotiating, responding to discovery demands, attending meetings, coordinating with other in-house counsel, and directing class counsel in settling the case. See 11/14/01 Affidavit of Richard W. Cohen ¶¶ 12-14, 17; Declaration of Carol Nakhuda, Esq. ¶¶ 5-6, attached to 11/13/01 Affidavit of Hollis L. Salzman, Ex. 3; 11/14/01 Affidavit of Bernard Persky ¶¶ 11-13. The aggregate incentive awards respectively represent approximately 0.3% of each class's recovery. As with the expenses, these requests are

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[45] See supra note 7 and accompanying text.

uncontested, and the Court finds them reasonable and will accordingly approve the petition.

(4) Certification of Classes for Settlement Purposes Only

Finally, the United Wisconsin plaintiffs seek final certification of the following class for settlement purposes only:

> All Third Party Payors (as described below) that have reimbursed or otherwise paid, in whole or part, for prescriptions of tablets of generic Lorazepam or generic Clorazepate (the "Drugs") filled during the period January 1, 1998 through December 31, 1999 (the "Class Period") for natural persons resident in Arizona, California, the District of Columbia, Florida, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, North Carolina, North Dakota, Pennsylvania, South Dakota, Tennessee, West Virginia, and/or Wisconsin (the "United Wisconsin Jurisdictions") (the "Settlement Class"). "Third Party Payor" means any non-governmental entity that is (i) a party to contract, issuer of a policy, or sponsor of a plan, which contract policy or plan provides prescription drug coverage to natural persons, and is also (ii) at risk, pursuant to such contract, policy or plan, to pay or reimburse the amount associated with the cost of prescription drugs to natural persons covered by such contract, policy, or plan.

11/15/01 Mot. at 2-3. The plaintiffs in Arkansas Carpenters similarly seek certification of the following class for settlement purposes only:

> All Third Party Payors (as described below) that have reimbursed or otherwise paid, in whole or part, for prescriptions of tablets of generic Lorazepam or generic Clorazepate (the "Drugs") filled during the period January 1, 1998 through December 31, 1999 (the "Class Period") for natural persons resident in Alaska, Alabama, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Iowa, Idaho, Illinois, Indiana, Kentucky, Maryland, Missouri, Mississippi, Montana, Nebraska, New Hampshire, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Texas, Utah, Virginia, Vermont, Washington, and/or Wyoming (the "Settlement Class"). "Third Party Payor" means any non-governmental entity that is (i) a party to contract, issuer of a policy, or sponsor of a plan, which contract policy or plan provides prescription drug coverage to natural persons, and is also (ii) at risk, pursuant to such contract, policy or plan, to pay or reimburse the amount associated with the cost of prescription drugs to natural persons covered by such contract, policy, or plan.

11/15/01 Mot. at 2. A settlement class certification must comply with all four prerequisites of

Rule 23(a) and one of the three subsections of Rule 23(b). See Thomas v. Albright, 139 F.3d 227, 234 (D.C. Cir. 1998). Rule 23(a) permits certification only if: (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. Fed. R. Civ. Proc. 23(a).

The classes meet all four requirements of Rule 23(a). First, there are over 13,000 class members involved in the cases, rendering joinder impracticable. See, e.g., 11/14/01 Affidavit of Bernard Persky ¶ 94 & n.20; Affidavits of Dawn E. Addazio ¶ 11, attached to 11/14/01 Affidavit of Bernard Persky, Exs. 2-3. Second, there are several questions of fact and law common to each class pertaining to the liability and damages for the alleged antitrust violations, as discussed at length above. Third, the plaintiffs' claims are typical of their respective class members in that they allege illegal combination, conspiracy, or agreement by the defendants which resulted in the anticompetitive injuries. Finally, the Court finds no conflicting interests with absent members of the class, cf., e.g., supra pp. 38-42, and it finds that the representative parties have a genuine interest in this litigation and that their counsel are qualified and experienced.

With respect to Rule 23(b), the plaintiffs have moved for certification under Rule 23(b)(3), which requires "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. Proc. 23(b). Rule 23(b)(3) further provides that matters pertinent to the findings include:

> (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. Proc. 23(b)(3).

The plaintiffs have satisfied the Rule 23(b)(3) requirement as well. They correctly highlight the fact that predominance is readily met in these types of cases, which allege violations of antitrust laws. See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."). The Court does not find this case to be an exception considering the nature of the complex issues involved in this antitrust case that are common to the class. And the Court is satisfied that the class action is superior for handling the claims of the 13,000 individuals involved in these cases nationwide; addressing them individually obviously would waste judicial resources and result generally in great inefficiency. The Court therefore will grant class certification in each case for settlement purposes only.

III. CONCLUSION

For the foregoing reasons, in the FTC/Plaintiff States' action the Court will: (1) grant final approval of the Mylan Settlement Agreement and the SST Settlement Agreement; (2) grant final approval of the Plaintiff States' proposed distribution plans; (3) grant final approval of the payment of the costs of notice and claims administration; (4) grant final approval of the payment of the Plaintiff States' attorneys' fees and litigation costs; and (5) grant certification of the appropriate class for settlement purposes only. In each of third party payor actions, the Court will: (1) grant final approval of the Settlement Agreement; (2) grant final approval of the Allocation and Distribution Plan; (3) grant final approval of the petition for attorneys' fees, litigation expenses, and incentive awards; and (4) grant certification of the respective class for settlement purposes only. Appropriate final judgments and orders will accompany this Memorandum Opinion.

February 15th, 2002

Thomas F. Hogan
Chief Judge